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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 383

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER

vs.

GEORGE B. CLIFFORD, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 13, 1939
CERTIORARI GRANTED NOVEMBER 6, 1939

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Proceedings in U. S. C. C. A., Eighth Circuit.....	A	1
Caption [omitted in printing].....	A	1
Proceedings before the United States Board of Tax Appeals.....	1	1
Docket entries.....	1	1
Petition of George B. Clifford, Jr., for appeal.....	2	2
Exhibit A.—Notice to George B. Clifford, Jr., of deficiency in tax, February 15, 1937.....	5	3
Statement.....	6	4
Answer of Commissioner of Internal Revenue.....	9	6
Opinion of the United States Board of Tax Appeals, Oppen, M.....	10	7
Order of redetermination.....	17	11
Motion of petitioner for review by full Board, etc.....	17	12
Order denying motion for review by full Board, etc.....	19	13
Petition of George B. Clifford, Jr., for review of decision of United States Board of Tax Appeals.....	20	14
Assignment of errors.....	23	16
Notice of filing of petition for review and service.....	26	18
Statement of evidence.....	27	19
Caption.....	27	19
Offer of stipulation as to facts.....	28	19
Offer of exhibits.....	28	19
Approval of statement of evidence by counsel for respondent on review.....	29	20
Approval of statement of evidence by Commissioner of Internal Revenue.....	29	20

Statement of evidence—Continued.	Original	Print
Approval of statement of evidence by member of United States Board of Tax Appeals	29	20
Stipulation as to facts	30	21
Exhibit A.—Declaration of trust of George Barnard Clifford, Jr., June 20, 1934	35	22
Exhibit A.—List of securities set aside pursuant to declaration of trust	38	27
Petitioner's and respondent's exhibits	39	19
A-1.—Fiduciary tax return of George B. Clifford, Jr., trust for the period from January 1, 1934, to June 19, 1934	39	19
B-2.—Fiduciary tax return of George B. Clifford, Jr., trust for the period from June 20, 1934, to December 31, 1934	43	19
C-3.—Individual income tax return of George B. Clifford, Jr., trust for the period from June 20, 1934, to December 31, 1934	49	19
D-4.—Individual income tax return of George B. Clifford, Jr., for the year 1934	53	20
E-5.—Individual income tax return of Virginia Clifford for the year 1934	59	20
Præcipe for transcript	67	27
Clerk's certificate to transcript [omitted in printing]	68	28
Appearances of counsel [omitted in printing]	69	28
Order of submission	71	28
Opinion, Gardner, J.	72	29
Decree	80	35
Clerk's certificate [omitted in printing]	81	35
Order allowing certiorari	82	35

A [Caption omitted.]

1 Before United States Board of Tax Appeals

Docket No. 89054

GEORGE B. CLIFFORD, JR., PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket entries

Appearances: For Taxpayer: Thomas P. Helme, Esq. For
Comm'r.: W. Frank Gibbs, Esq.,

1937

May 13—Petition received and filed. Taxpayer notified. (Fee
paid.)

May 13—Copy of petition served on General Counsel.

Jul. 9—Answer filed by General Counsel.

Jul. 13—Copy of answer served on taxpayer.

Jul. 19—Motion for circuit hearing at St. Paul, Minn., filed by
taxpayer. 7/20/37 granted.

1938

Apr. 15—Hearing set June 20, 1938, at St. Paul.

Jun. 20—Hearing had before Mr. Oppen on merits. Submitted.
Stipulation as to the facts filed. Petitioner's brief due
7/20/38—respondent's due 8/20/38—reply due 9/6/38.

Jul. 18—Brief filed by taxpayer. 7/18/38 copy served on General
Counsel.

Jul. 25—Transcript of hearing of June 20, 1938, filed.

Aug. 19—Brief filed by General Counsel.

2 Sep. 3—Reply brief filed by taxpayer. 9/6/38 copy
served

Sep. 26—Memorandum opinion rendered, Mr. Oppen, Div. 14.
Decision will be entered for the respondent.

Sep. 27—Decision entered, Clarence V. Oppen, Div. 14.

Oct. 24—Motion for review by full Board and, if that be not
granted, for reconsideration filed by taxpayer.

Oct. 25—Order denying review by the full Board and recon-
sideration entered.

Dec. 19—Supersedeas bond in the amount of \$6,000.00 approved
and ordered filed.

Dec. 20—Petition for review by U. S. Circuit Court of Appeals (8)
with assignments of error filed by taxpayer.

Dec. 20—Proof of service filed by taxpayer.

1939

Jan. 16—Agreed statement of evidence lodged.

Jan. 16—Agreed praecipe for record with proof of service thereon
filed.

Jan. 31—Agreed statement of evidence approved and ordered
filed.

Before United States Board of Tax Appeals

[Title omitted.]

Petition of George B. Clifford, Jr., for appeal

(Filed May 13, 1937)

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, IT: D: 2, FDT: 90D, dated February 15, 1937, and as basis for this proceeding alleges as follows:

1. The petitioner is an individual with his residence at 2601 E. Lake of Isles Boulevard, Minneapolis, Minnesota.

2. The notice of deficiency, a copy of which is attached and marked "Exhibit A," was mailed to the petitioner on February 15, 1937, as the petitioner believes.

3. The taxes in controversy are income taxes for the calendar year 1934. The amount of deficiency asserted is \$2,909.41, of which amount \$2,756.62 is in dispute.

4. The determination of tax set forth in said notice of deficiency is based upon the following error:

(a) Including in the income of petitioner income from George B. Clifford, Jr., Trust (dated June 20, 1934) in the sum of \$10,111.23.

5. The facts upon which the petitioner relies are as follows:

(a) The petitioner on or about June 20, 1934, declared himself trustee of certain securities, under a written Declaration of Trust, a true and correct copy of which is hereto attached, marked "Exhibit B," and made a part hereof as fully as if herein set forth.

(b) As Trustee under said Declaration of Trust, the petitioner during the year 1934 received interest upon Tax Free Covenant Bonds in the sum of \$500.00, other interest in the sum of \$480.45, and dividends in the sum of \$8,000.00. As such trustee, petitioner, after making deductions in the sum of \$81.38 for expenses of the trust, distributed said ordinary income (interest and dividends) during the year 1934 to Virginia Clifford as beneficiary under said Declaration of Trust. That during the year 1934, petitioner as trustee under said trust, and not otherwise, realized a capital net gain of \$1,160.96.

(c) The petitioner and Virginia Clifford were living during the entire year 1934.

(d) The petitioner made and filed a fiduciary return as such trustee for the year 1934, and in said return showed all interest and dividends (except actual deductions from such income authorized by law) to have been distributed in said year to said Virginia Clifford as beneficiary thereof and showed said trust as beneficiary and recipient of said capital net gain.

(e) Virginia Clifford made and filed her individual return for the year 1934 and showed receipt in 1934 of all interest and dividends of

said trust as beneficiary of said Declaration of Trust (except deductions for expenses of trust).

(f) The petitioner, as trustee of said trust, and not otherwise, filed an income-tax return on behalf of said trust with respect to said capital net gain of said trust in the year 1934.

(g) Virginia Clifford was the sole person entitled by the terms of said trust to receive the income therefrom in the year 1934.

(h) The said Declaration of Trust was and is a valid irrevocable trust.

(i) The income of said trust is not the income of the petitioner.

(j) The Commissioner has included the income of said trust (interest, dividends, and net capital gains) in the year 1934 in the income of the petitioner.

(k) The determination of the Commissioner is erroneous.

Wherefore, the petitioner prays that this Board may hear the proceeding and determine that the deficiency due from the petitioner for the year 1934 shall not exceed \$152.79.

GEORGE B. CLIFFORD, Jr.,

Petitioner.

THOMAS P. HELMEY,

Counsel for Petitioner,

1100 First National-Soo Line Bldg.,

Minneapolis, Minnesota.

[Duly sworn to by George B. Clifford, Jr.; jurat omitted in printing.]

Exhibit A to petition

FEB. 15, 1937.

IT:D:2

FDT:90D

MR. GEORGE B. CLIFFORD, Jr.,

614 Security Building, Minneapolis, Minnesota.

SIR: You are advised that the determination of your income tax liability for the taxable year(s) 1934 discloses a deficiency of \$2,909.41 as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:Cl:P:7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency and will prevent the accumulation of interest; since the interest

4 GUY T. HELVERING VS. GEORGE B. CLIFFORD, JR.

6 period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner.

By CHAR. T. RUSSELL,
Deputy Commissioner.

Enclosures:
Statement
Form 870

FDT/JP-3

Statement

IT:D:2
FDT:90D

In re: Mr. George B. Clifford, Jr., 614 Security Building, Minneapolis,
Minnesota

Income Tax Liability

Year, 1934; Income Tax Liability, \$8,440.34; Income Tax Assessed, \$5,530.93; Deficiency, \$2,909.41.

Further reference is made to Bureau letters dated November 4, 1936, and January 7, 1937, advising you of the approval of the report of the internal revenue agent in charge, St. Paul, Minnesota, to your protest dated December 2, 1936, and to your letter of January 22, 1937, in reply to Bureau letter of January 7, 1937.

You are advised that the records of the Bureau do not disclose that there are any cases now pending in the Courts involving the taxability of trust income under section 166 of the Revenue Act of 1934. Inasmuch as you do not desire a conference or hearing at Washington, this letter of final determination is being issued to comply with the provisions of section 272 (a) of the Revenue Act of 1934.

Careful consideration has been accorded your protest dated August 4, 1936, against the findings of the examining officer and the information furnished at a conference held in the office of the internal revenue agent in charge.

7 After examination of the trust instruments dated September 22, 1933, and June 20, 1934, creating the George B. Clifford, Jr., Trust, of which your wife, Virginia Clifford, is the sole beneficiary, it appears that you, as grantor, retained unlimited power over the assets of the trust and the right of revocation. It is held, therefore, that the income of the trust is taxable to you under section 166 of the Revenue Act of 1934.

GUY T. HELVERING VS. GEORGE B. CLIFFORD, JR.

5

Net income shown on your return		\$44,652.48
Add:		
1. Interest:		
(a)	\$235.05	
(b)	187.50	\$422.55
2. Capital loss reduced		\$119.91
3. Dividends		145.56
4. Taxes		38.51
Forward		\$45,379.01
Brought forward		\$45,379.01
5. Fiduciary:		
(a) Interest:		
Trust #1	\$1,311.32	
Trust #2	980.45	
(b) Home Owners Loan Corporation: Interest, Trust #1	114.00	
(c) Dividends:		
Trust #1	8,000.00	
Trust #2	8,000.00	
(d) Capital gains:		
Trust #1	3,787.20	
Trust #2	1,180.96	
Total	\$23,353.93	
Less: Expenses	30.18	
	23,323.75	
Deduct: Trust income reported	13,345.01	9,978.74
Revised net income		\$35,357.75
8 Less: Personal exemption and credit for 4 dependents		4,100.00
Balance subject to surtax		\$51,257.75
Less:		
Dividends	\$39,687.17	
Interest on Home Owners Loan Corporation	114.00	
Earned income credit	1,350.00	\$41,151.17
Balance subject to normal tax		\$10,106.58
Normal tax at 4% on \$10,106.58		\$404.26
Surtax on \$51,257.75		8,077.33
Total		\$8,481.59
Less: Tax paid at source		41.25
Net tax assessable		\$8,440.34
Tax Previously assessed, account #200370		5,530.93
Deficiency		\$2,909.41

EXPLANATION OF CHANGES

1. (a) Examination of your records of individual income discloses you received interest from bonds not containing a tax-free covenant clause of \$627.62, whereas you report \$392.57 only on line 3 of your return.

(b) Information certificates, form 1000, indicate you received \$775.00 as interest from bonds containing a tax-free covenant clause whereas you reported \$587.50 only from this source.

2. Since the cost of the Texas Gulf Producing Company stock sold in 1934 was \$1,155.09 instead of \$1,275.00 as stated on your return, capital loss was overstated by \$119.91.

3. Dividends received from the State Street Investment Corporation were understated by \$145.56.

4. Special improvement taxes in the sum of \$38.51 have been eliminated from your return. (Section 23(c)-4 of the Revenue Act of 1934.)

9 5. This item has been explained above.

A copy of this communication has been furnished Mr. Thomas P. Helme, 1100 First National-Soo Line Building, Minneapolis, Minnesota, in accordance with the authority conferred upon him in the power of attorney executed by you and on file in the Bureau.

FDT/JP-3

For "Declaration of Trust" see Stipulation of Facts.

Before United States Board of Tax Appeals

[Title omitted.]

Answer of Commissioner of Internal Revenue

Filed July 9, 1937

The Commissioner of Internal Revenue, by his attorney, Morrison Shafroth, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer admits and denies as follows:

1. 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the taxes in controversy are Federal income taxes for the calendar year 1934, but denies that the amount in dispute is \$2,756.62 as alleged in paragraph 3 of the petition.

4. (a). Denies that the Commissioner erred as alleged in paragraph 4 (a) of the petition.

5. (a) to (k). Denies the material allegations of fact contained in subparagraphs (a) to (k), inclusive, of paragraph 5 of the petition.

Denies generally and specifically each and every allegation set forth in taxpayer's petition not hereinbefore admitted, qualified, or denied.

10. Wherefore, it is prayed that the taxpayer's appeal be denied.

MORRISON SHAFROTH,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

IRVING M. TULLAR,
Special Attorney,
Bureau of Internal Revenue.

IMT/lds 7/8/37.

Before United States Board of Tax Appeals

Docket No. 89054

GEORGE B. CLIFFORD, JR., PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Thomas P. Helmeý, Esq., for the petitioner. W. Frank Gibbs, Esq., for the respondent.

Opinion

Oppe: Respondent determined a deficiency in income tax for the year 1934 in the amount of \$2,909.41, of which amount \$2,756.62 is disputed by the petitioner in this proceeding. The issue is whether all or any part of the income of an alleged trust created by the petitioner is taxable to him.

From a stipulation filed by the parties the following are found as facts:

On June 20, 1934, the petitioner executed the following instrument:

DECLARATION OF TRUST

I, George Barnard Clifford, Jr., of Minneapolis, Minnesota, being the owner and holder of all the bonds, debentures, notes, certificates, or other securities referred to in the attached Exhibit A, do hereby acknowledge and declare that I do and will hold all of the same and all my right, title, and interest therein as a trust estate in trust for the uses and purposes and upon the terms and conditions following:

11 1. All the net income from the trust estate received during the continuance of the trust hereby created and remaining after payment of or due allowance for all expenses of holding, managing, or administering the same, including any taxes that I, as trustee thereof, may be obliged or may elect to pay, shall be held for the exclusive benefit of Virginia R. Clifford (for convenience herein after sometimes referred to as the life beneficiary).

2. The trust hereby created shall continue for a term of five (5) years from the date of this Declaration of Trust unless the life beneficiary or myself shall die during said term, and at the expiration of said term or upon the earlier death of the life beneficiary or myself during said term, whichever event shall first occur, the trust hereby created shall forthwith and without any further act or deed terminate.

3. During the continuance of this trust, I, as trustee, may pay and distribute to the life beneficiary, quarterly or at such other times as I may deem convenient during any calendar year, the whole or such part of the net income of said trust as I, as trustee, may in my absolute discretion determine. Upon the termination of the trust, at the expiration of the term of this trust or upon the earlier death of the life

beneficiary or myself as provided in paragraph numbered 2, above, any and all accrued or undistributed net income from the trust estate and any proceeds from the investment of such net income in my hands as trustee shall be deemed and treated as property owned absolutely by Virginia R. Clifford as of the time of the termination of the trust, and the remainder of the trust estate, including the entire principal or corpus thereof, shall be deemed and treated as property owned absolutely by me as of the same time.

4. During the continuance of the trust hereby created I shall have full power and authority to do the following things: (a) To exercise, or to appoint proxies to exercise, any and all voting powers under any certificates or shares of stock in the trust estate; (b) to retain, or to sell, exchange, mortgage, or pledge any certificates, shares of stock,

securities, or other items of property or any fractional interest

12 in any of the same now or hereafter in the trust estate, whether as part of the corpus or principal thereof or as investments or

proceeds and any income therefrom, upon such terms and for such consideration as I, in my absolute discretion, may deem fitting; (c)

to invest any cash or money in the trust estate or any income therefrom by lending the same with or without security or by depositing

the same in any bank, trust company, or other similar institution, or by purchasing secured or unsecured notes or certificates of deposit or

by purchasing any bonds, stocks, securities or other personal property of any description, without restriction because of the speculative character of the investment or the rate of return therefrom or any laws

pertaining to the investment of trust funds; (d) to collect, receive, and hold all dividends, interest, increment, and income belonging or

due to the trust estate; (e) to compromise, settle, or adjust or release any claims which I may hold as trustee; (f) to hold any securities or

items of property or any fractional interest therein, which may be in the trust estate, in the names of other persons or in my own name as

an individual except as in this agreement otherwise provided.

5. Extraordinary cash dividends, any dividends paid in stock or the proceeds received from sale of any subscription rights not exercised, or any enhancement, realized or not, in the value of securities

shall be considered and treated as principal and not income. All premiums on investments shall be charged and all discounts on investments

shall be credited against or to principal as the case may be.

6. I shall not individually or as trustee be liable or responsible to the life beneficiary for any loss of any kind except in consequence of my own willful and deliberate violation of my duties as trustee herein

particularly specified.

7. Except as otherwise herein provided specifically to the contrary, no title in or to the trust estate or any income therefrom shall vest in

the life beneficiary, and neither the principal nor any future or accrued or undistributed income shall be liable or in any manner

chargeable for the debts of the life beneficiary, and the life beneficiary shall have no power to sell, transfer, encumber, or in any

13 manner anticipate or dispose of any interest in the trust estate or any income therefrom prior to actual payment or delivery thereof to the life beneficiary.

On the same day as the foregoing instrument was executed Virginia R. Clifford, as the beneficiary thereof acknowledged in writing notice of its execution.

We further find:

That during the year 1934, Virginia Clifford had substantial means of her own. That her stocks, bonds, and other securities during said year had a value in excess of \$150,000. That her income from her own investments was approximately \$12,703.83.

That over a period of many years, commencing in 1934 or prior thereto, down to and including the present year 1938, the petitioner has made transfers of substantial sums in stocks and bonds directly to Mrs. Clifford and their three children. That the petitioner has intended by said gifts to give security and economic independence to his wife and children. That tax effects of such gifts were considered by the petitioner, but that such tax effects were not the sole consideration in making said gifts. That the creation of the trust of June 20, 1934, was part of this general purpose.

That petitioner on or about March 15, 1936, filed with the Collector of Internal Revenue at St. Paul, Minnesota, Gift Tax return for the calendar year 1934, and paid gift tax shown to be payable by said return. That said return included the value as of date of gift of said trust to Virginia Clifford.

* * * (1) That he has, as trustee of said trust, distributed any income therefrom only to Virginia Clifford, as beneficiary thereof, except minor items disbursed for taxes or expenses of the trust itself.

That there were no additions, restrictions, or supplemental understandings modifying the terms of said Declaration of Trust of June 20, 1934. * * * 1 That there was not at the time of the creation of said trust, and there never has been any agreement between the petitioner and Virginia Clifford as to the use of the income from said trust or any direction or instruction by the petitioner as to the use thereof.

That the petitioner has since the date of said trust maintained a separate bank account as Trustee; that he has placed in said account income and cash of said trust. That Virginia Clifford has for many years prior to the date of said trust and continuously to the present maintained a separate personal bank account in her own name; that she is the only person who could or did draw checks on said account at any time during 1934 to the present date. That Virginia Clifford

¹ The portions of the stipulation here omitted seem to us to be conclusions of law and for that reason we refrain from making them a part of our findings of fact. The commissions state that petitioner and his wife would testify substantially "That the petitioner, George B. Clifford, Jr., has at all times from and after June 20, 1934, held the securities listed in the schedule attached to the said Declaration of Trust, dated June 20, 1934, and the proceeds from any sale thereof and all investments of the said proceeds in trust pursuant to the terms of said Declaration of Trust" and "That Virginia Clifford has at all times been free to use the income of said trust for any purpose she might wish."

at all times deposited in her said bank account income from her own stocks, bonds, and other securities. That George B. Clifford, Jr., as trustee, has at all times issued checks against the said trust account to Virginia Clifford for the income of said trust, and said checks have at all times been deposited in Virginia Clifford's said personal bank account, larger items of income have been checked out of the trust account in this manner soon after receipt by trustee, small items have been permitted to accumulate for short periods in trustee's account before transfer to Virginia Clifford's personal account. That the income of said trust, when received by Mrs. Clifford, was deposited in and intermingled in the same account with income from all securities owned by Mrs. Clifford. That no record has been kept of the use or expenditure by Mrs. Clifford of the funds so deposited in Mrs. Clifford's personal bank account during the year 1934. That Mrs. Clifford paid from said account the monthly allowance of \$133.00 to her mother and other gifts to her mother and other relatives, purchases of clothing for herself and her children, personal jewelry, antiques, and other art objects and personal travel. That she also paid from said account certain so-called household bills or accounts as women servants, cleaning bills, and supplies.

That the petitioner and Mrs. Clifford did not intend or contemplate that the petitioner should be relieved or discharged from the liability for the payment of any household or family expenses by said trust. That the petitioner, after execution of said trust, paid large sums for so-called household or family expenses out of his own personal funds.

That the petitioner has not, subsequent to the creation of said trust, withdrawn or used for his own purpose any part of the principal or income of said trust and that he has not exercised any power with respect thereto which is not authorized by the terms of said Declaration of Trust.

During the taxable year the petitioner filed a fiduciary return for the trust and also a tax return on behalf of the trust.

The fiduciary return of said trust showed a net income of \$9,764.13; this return showed the capital gain therefrom, or \$1,310.20, as distributed to and chargeable to the trust; and showed the balance of net income therefrom, or \$8,453.93, as distributed to and chargeable to Virginia Clifford. The tax return filed on behalf of the trust included the item of \$1,310.20 and tax upon this amount after deducting personal exemption of \$1,000 was paid by the trust. The net income of the trust from sources other than capital gains were included in the individual return of Virginia Clifford for the year 1934. The petitioner did not include any income of the said trust in his return for the year 1934.

The petitioner objects to the inclusion in his income for the year 1934 of any part of the income of the trust under the Declaration of Trust, dated June 20, 1934. No objection is made to the adjustments in income, and deductions in the return of said trust. It is

16 agreed between the parties hereto that the following statement correctly reflects the income of said trust:

Interest	480.45	
Interest tax-free covenant bonds	500.00	
Capital Gain	1,160.96	
Dividends	8,000.00	
Total income		\$10,141.41
Taxes paid	.18	
Other deductions	30.00	
Total deductions		30.18
Net income		\$10,111.23

Respondent's determination is sustained on the authority of Benjamin F. Wollman, 31 B. T. A. 37, William C. Rands, 34 B. T. A. 1107, and Warren H. Corning, 36 B. T. A. 301, 308. The rights of possession, control and ultimate enjoyment remaining in the petitioner under the terms of the trust instrument are similar to those in the Wollman case and, as there, "for Federal tax purposes we think his retained interest and powers were so substantial that the securities may properly be regarded as his property and the income taxable to him. * * * The line that separates petitioner's rights under these powers from those of complete ownership is too fine to be distinguishable." For tax purposes the arrangement was no more than an ineffectual attempt to secure a result whereby "the fruits are attributed to a different tree from that on which they grow." Lucas vs. Earl, 261 U. S. 111; William C. Rands, supra, 1115, Henry A. B. Dunning, 36 B. T. A. 1222, is not an authority to the contrary since the facts there recognized as distinguishing the Wollman and Rands cases (p. 1227) are also present here. In Meredith Wood, 37 B. T. A. 1065, John E. Rovensky, 37 B. T. A. 704, and Phebe Warren McKean Downs, 36 B. T. A. 1129, this question was not considered nor decided. We need not discuss respondent's further contentions that petitioner is also taxable under the provisions of sections 17 166 or 167, Revenue Act of 1934, or under the "family maintenance" doctrine.

Decision will be entered for the respondent.

Enter.

Entered Sep. 26, 1938.

(Seal) U. S. Board of Tax Appeals. 1924.

Before United States Board of Tax Appeals, Washington

[Title omitted.]

Order of redetermination

September 27, 1938.

Pursuant to the determination of the Board, as set forth in its Memorandum Opinion, entered September 26, 1938, it is

Ordered and Decided: That there is a deficiency in income tax of \$2,909.41 for the year 1934.

Enter.

Entered Sep. 27, 1938.

(Seal of U. S. Board of Tax Appeals.)

CLARENCE V. OPPER,
Member.

Before United States Board of Tax Appeals

[Title omitted.]

Motion for review by full Board and, if that be not granted, for reconsideration

Filed Oct. 24, 1938

18 Comes now the petitioner by his counsel, Thomas P. Helmeý, and moves this honorable Board to grant the said petitioner a review by the entire Board of the report of the division entered in the above-entitled matter on September 26, 1938. If that motion be not granted, petitioner further moves the honorable Board for reconsideration of the above-entitled matter.

The petitioner, on June 20, 1934, by a declaration of trust, declared himself trustee of certain securities to pay the income therefrom to his wife for a period of five years or until the earlier death of either petitioner-settlor or his wife. By the terms of the trust, the income therefrom during the trust period is the absolute property of the wife-beneficiary. The principal of the trust fund reverts to this petitioner upon termination of the trust. The petitioner has administered the trust in accordance with its provisions, has maintained a separate bank account as trustee, and paid all income of the trust for the year 1934 to his wife in that year.

Each of said motions is made on the following grounds:

(1) The report by its own language determines this case in a manner inconsistent with recent rulings of this Board. The divisional decision states: "In Meredith Wood, 37 B. T. A. 1065, John E. Rovensky, 37 B. T. A. 704, and Phebe Warren McKean Downs, 36 B. T. A. 1129, this question was not considered nor decided." The clear implication is that if the question had been considered or decided, the previous decisions would have been in accord with the divisional report in the present case. Before Meredith Wood, John E. Rovensky and Phebe Warren McKean Downs are reversed, the whole matter of short-term irrevocable trusts should receive the reconsideration of the entire Board.

(2) The divisional decision cannot be reconciled with the Board's earlier decision in Meredith Wood, 37 B. T. A. 1065 (June 17, 1938),

and the subsequent memorandum decisions of H. Rodney Sharp (Paragraph 7272D of C. C. H. 1938 Tax Service) and Elizabeth Achelis (Paragraph 7629A of C. C. H. 1938 Tax Service). The Meredith Wood case cannot be distinguished from the present case.

In both cases petitioner declared himself trustee of certain securities for a period of five years; in both cases the beneficiary became the absolute and unconditional owner of the trust income for the five-year period; in both cases the petitioner had a reversionary interest in the corpus; in both cases the trustee had the same trust powers. Yet in the Meredith Wood case the trust income was held not taxable to the settlor. In the present case the trust income was held taxable to the settlor. If the trust entity in the present case may be disregarded for income-tax purposes, then the trust entity in Meredith Wood should also be disregarded. If the trust entity should be respected, as it was in the Meredith Wood case, then it should also be respected here.

(3) The determination of the Board in the present case should conform with other recent decisions of this Board. If this line of discussion is to be overruled, such action should be taken only after full argument and joint consideration by the entire Board.

Respectfully submitted.

THOMAS P. HELMEY,

Counsel for Taxpayer,

1100 First National-Soo Line Building,

Minneapolis, Minnesota.

F. H. STINCHFIELD

(Stinchfield, Mackall, Crounse, McNally & Moore and

William W. Watson).

Of Counsel.

Before United States Board of Tax Appeals

Order denying review by the full Board and reconsideration

Under date of September 26, 1938, a memorandum opinion by Division No. 14 (Opper) was entered in the above entitled proceeding and on October 24, 1938, counsel for the petitioner filed with the Board a "Motion for Review by the Full Board and, if that be not Granted, for Reconsideration." Petitioner's motion has been carefully considered in connection with the report of the Division and it is not believed that the motion should be granted. Accordingly, the motion is Denied.

Petitioner is granted an exception to the denial of his said motion.

C. R. ARUNDELL,

Chairman

Dated October 25, 1938.

[Seal] U. S. Board of Tax Appeals, 1924.

In United States Circuit Court of Appeals for the Eighth Circuit
*Petition of George B. Clifford, Jr., for review of decision of U. S.
 Board of Tax Appeals*

Filed December 20, 1938

[Title omitted.]

*To the Honorable Judges of the United States Circuit Court of
 Appeals for the Eighth Circuit:*

Now comes, George B. Clifford, Jr., the petitioner on review above named, personally and by his attorney, Thomas P. Helmev, and respectfully shows:

I

JURISDICTION

This is a proceeding for review by the United States Circuit Court of Appeals for the Eighth Circuit of a decision of the United States Board of Tax Appeals, entered on the 27th day of September 1938, redetermining a deficiency in income taxes for the calendar year 1934 against your petitioner in the amount of \$2,909.41.

Your petitioner (hereinafter sometimes referred to as the taxpayer), at the time of filing this petition is, and at all times hereinafter referred to was, a citizen of the United States and a resident of the City of Minneapolis, County of Hennepin, and State of Minnesota.

The respondent (hereinafter sometimes referred to as the Commissioner) is the duly appointed, qualified, and acting Commissioner of Internal Revenue of the United States, holding this office under and by virtue of the laws of the United States.

The petitioner made his income-tax return for the calendar year 1934, the taxable year involved in this proceeding, to the Collector of Internal Revenue for the District of Minnesota, whose office now is, and at all times herein referred to was, located in the City of St. Paul, State of Minnesota, and within the Judicial district of the United States Circuit Court of Appeals for the Eighth Circuit.

II

NATURE OF CONTROVERSY

The taxpayer, Mr. Clifford, filed his income-tax return for the calendar year 1934 on March 14, 1935.

On February 15, 1937, the Commissioner, pursuant to the provisions of Section 272 (a) of the Revenue Act of 1934 (48 Stat. 680) forwarded to the taxpayer by registered mail a notice of deficiency wherein the taxpayer was notified of the Commissioner's determination of deficiency of \$2,909.41 in the taxpayer's income-tax liability for the year 1934.

Thereafter on May 13, 1937, the taxpayer filed a petition with the United States Board of Tax Appeals for a redetermination of the proposed deficiency in his income-tax liability for the year 1934, as disclosed by the notice of deficiency dated February 15, 1937, as aforesaid, which petition was assigned Docket No. 89054. \$2,756.62 of the proposed deficiency of \$2,909.41 was disputed. On July 9, 1937, the Commissioner filed with the Board of Tax Appeals his answer to the petition filed by the taxpayer. The proceeding came on for hearing before a division of the Board of Tax Appeals sitting at St. Paul, Minnesota, on June 20, 1938.

22 At the hearing a stipulation as to facts was offered and received in evidence. No additional evidence was offered except several original returns. The sole issue is whether the 1934 income from a trust created by the taxpayer on June 20, 1934, should be taxed to him individually as part of his 1934 income. (This trust of June 20, 1934, is hereinafter sometimes referred to as the trust.) The deficiency letter of February 15, 1937, treated the trust income as part of the taxpayer's income. The Commissioner expressed in such letter his conclusion that the taxpayer, as grantor, retained unlimited power over the assets of the trust and, in addition, a power of revocation. On such grounds, the Commissioner held the trust income taxable to the taxpayer as settlor under Section 166 of the Revenue Act of 1934. The Board of Tax Appeals states in its opinion that "the rights of possession, control, and ultimate enjoyment remaining in the petitioner under the terms of the trust instrument" are so substantial that the trust assets should be regarded as petitioner's and the income taxable to him individually. This conclusion was reached by the Board without consideration of the Commissioner's further contentions under Sections 166 and 167 of the Revenue Act of 1934 or under the "family maintenance" doctrine.

On September 26, 1938, the Board of Tax Appeals entered its memorandum opinion wherein it held that the income of the trust was to be included in the taxpayer's income. On September 27, 1938, the Board entered its decision pursuant to said opinion, wherein it was ordered and decided that there was a deficiency of \$2,909.41 in income tax for the year 1934. On October 24, 1938, the taxpayer filed an alternative motion for review by the full Board or for reconsideration. On October 25, 1938, the Board denied the motion.

The facts are briefly summarized as follows:

23 The taxpayer by a written declaration of trust on June 20, 1934, declared himself trustee of certain securities. Mrs. Virginia Clifford, the wife of the settlor, was the beneficiary of the trust. The trust was to continue for five years or until the earlier death of either the settlor or the beneficiary. The trustee might distribute income currently to his wife as beneficiary. Upon termination of the trust she became entitled to any accumulated income and to the proceeds from the investment thereof. Upon termination of the trust, the principal or corpus of the trust was to become the absolute prop-

erty of the taxpayer (or settlor). The Trustee was given the usual powers granted to a trustee in management of the estate. Neither the settlor nor any other person was given any power to revoke the trust. All income of the trust in 1934, except capital gains, was distributed to the wife (beneficiary). The trust income as received by the beneficiary was mingled with income which she received from her own securities. No limitation upon her use of such income was imposed by the trust instrument or by any collateral understanding or instruction.

III

COURT OF REVIEW

The taxpayer, being aggrieved by the findings of fact and conclusions of law contained in said findings and opinion of the Board, and by its decision entered pursuant thereto, desires to obtain a review thereof by the Court of Appeals for the Eighth Circuit.

IV

ASSIGNMENTS OF ERROR

The petitioner assigns error in the decision, acts, and omissions of the Board Tax Appeals in the following respects:

1. The Board erred, in that its decision is contrary to law.
2. The Board erred in finding that the taxpayer retained such rights of possession, control, and ultimate enjoyment with respect to the trust property that such property may properly be regarded the taxpayer's.
3. The Board erred in failing to find that the taxpayer had no such rights of possession, control, or ultimate enjoyment with respect to the trust property as would justify regarding the trust property as the taxpayer's.
- 24 4. The Board erred in failing to find that the taxpayer had created a bona fide, valid, and existing trust.
5. The Board erred in failing to find that the taxpayer retained no powers over trust property except such as he was given as trustee by the law and the trust instrument.
6. The Board erred in failing to find that the taxpayer as trustee retained under the trust instrument only such powers generally granted to trustees.
7. The Board erred in finding that all of the income of the trust was the income of the taxpayer.
8. The Board erred in finding that any part of the income of the trust was the income of the taxpayer.
9. The Board erred in failing to find that the net income of the trust other than capital gains was income of Virginia Clifford, the beneficiary of the trust.

10. The Board erred in failing to find that capital gains of the trust were income of the trust.

11. The Board erred in holding that the entire income of the trust was taxable to the taxpayer.

12. The Board erred in holding that any part of the income of the trust was taxable to the taxpayer.

13. The Board erred in failing to hold that the income of the trust other than capital gains was taxable to Virginia Clifford.

14. The Board erred in failing to hold that capital gains of the trust were taxable to the trust.

15. The Board erred in finding the following portion of the stipulation to be a conclusion of law:

"That the petitioner, George B. Clifford, Jr., has at all times from and after June 20, 1934, held the securities listed in the schedule attached to the said Declaration of Trust dated June 20, 1934, and the proceeds from any sale thereof and all investments of the said proceeds in trust pursuant to the terms of said Declaration of Trust."

25 16. The Board erred in failing to find as a fact, as was stipulated:

"That the petitioner, George B. Clifford, Jr., has at all times from and after June 20, 1934, held the securities listed in the schedule attached to the said Declaration of Trust dated June 20, 1934, and the proceeds from any sale thereof and all investments of the said proceeds in trust pursuant to the terms of said Declaration of Trust."

17. The Board erred in holding the following portion of the stipulation to be a conclusion of law:

"That Virginia Clifford has at all times been free to use the income of said trust for any purpose she might wish."

18. The Board erred in failing to find as a fact, as was stipulated:

"That Virginia Clifford has at all times been free to use the income of said trust for any purpose she might wish."

19. The Board erred in entering its decision and judgment for a deficiency of \$2,909.41, instead of a deficiency of \$152.79.

20. The Board erred in that its decision is not supported by any substantial evidence.

21. The Board erred in that its decision is not supported by the stipulated facts in this proceeding.

22. The Board erred in that its decision is not supported by its findings of fact in its memorandum opinion.

23. The Board erred in denying taxpayer's alternative motion for review by the full Board or for reconsideration.

Wherefore, the taxpayer petitions that the aforesaid decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Eighth Circuit; that a transcript of record be prepared in accordance with law and the rules of said Court and transmitted to the Clerk of said Court for filing, and that

18

GUY T. HELVERING VS. GEORGE B. CLIFFORD, JR.

26

appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

GEORGE B. CLIFFORD, Jr.,

THOMAS P. HELMEY,

Counsel for Petitioner,

1100 First National-Soo Line Bldg.,

Minneapolis, Minnesota.

F. H. STINCHFIELD,

*(Stinchfield, Mackall, Crounse, McNally & Moore,
and William W. Watson.)*

[Duly sworn to by George B. Clifford, Jr.; jurat omitted in printing.]

In United States Circuit Court of Appeals

Notice of filing of petition for review and service

Filed December 20, 1938

To J. P. WENCHEL, *Chief Counsel, Bureau of Internal Revenue,
Washington, D. C.:*

Please take notice that the petitioner on the 20th day of December 1938, filed with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the Court of Appeals of the Eighth Circuit of the decision of the Board heretofore rendered in the above entitled cause. A copy of the petition for
27 review and the assignments of error as filed is hereto attached and served upon you.

Dated at Minneapolis, Minnesota, this 20th day of December 1938.
Respectfully,

GEORGE B. CLIFFORD, Jr.,

THOMAS P. HELMEY,

Counsel for Petitioner.

1100 First Natl.-Soo-Line Bldg.,

Minneapolis, Minnesota.

Personal service of the foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 20th day of December 1938.

J. P. WENCHEL,

Chief Counsel,

Bureau of Internal Revenue,

Counsel for Respondent.

INTERVIEW AND RESPONDENT'S EXHIBIT A-1

[Faint, mostly illegible text block containing several paragraphs of handwritten or typed information. The text is heavily obscured by noise and artifacts.]



FIDUCIARY RETURN OF INCOME

For Calendar Year 1934

Period covered by return: January 1, 1934, and ended: NONE

1934
Serial
Number

950

File This Return Not Later Than the 15th Day of the Third Month Following the Close of the Calendar Year
(PRINT NAMES AND ADDRESS PLAINLY BELOW)

Name of Estate or Trust: George P. Clifford, Jr. Trust

Trust

(Check Boxed)

George P. Clifford, Jr. Trustee

Name and
Address of
Fiduciary

614 Security Building

Minneapolis, Minnesota.

Has income for the prior year filed up to and including the last day of the year? Yes

Has the fiduciary's office been at any time during the year? St. Paul

For trust instrument and statement required under Section 21 have been previously furnished state when and with whom they were

Are there any assets of the trust? Cash

Has the fiduciary received any income from the trust? Yes
If so, what is the amount? \$1,000.00
What is the source of the income? Interest on bonds
Has the fiduciary received any income from the trust? Yes
If so, what is the amount? \$1,000.00
What is the source of the income? Interest on bonds

INCOME

Income from the trust: \$1,000.00
Income from the trust: \$1,000.00
Income from the trust: \$1,000.00

DEDUCTIONS

Deductions from income: \$0.00
Deductions from income: \$0.00
Deductions from income: \$0.00

PETITIONER'S AND

1. State the year.
2. Merchandise bought for sale.
3. Other merchandise bought for resale.
4. Plus inventory at beginning of year.
5. Total. Lines 2 to 4.
6. Less inventory at end of year.
7. Net Cost or Cheap Sold. Line 5 minus Line 6.

Enter on line 7 the net cost or cheap sold. If the net cost or cheap sold is not stated, the merchandise is valued at cost or cheap or market, whichever is best.

Explanation of deductions claimed on Lines 7 and 8.

SCHEDULE C. INCOME FROM BUSINESS AND ROYALTIES

1. Kind of business	2. Date acquired	3. Date disposed	4. Description of business or property	5. Description of business or property	6. Description of business or property	7. Description of business or property	8. Description of business or property	9. Description of business or property	10. Description of business or property
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Explanation of deductions claimed on Schedule C.

SCHEDULE D. CAPITAL GAINS AND LOSSES

1. Description of property	2. Date acquired	3. Date disposed	4. Description of property	5. Description of property	6. Description of property	7. Description of property	8. Description of property	9. Description of property	10. Description of property
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- Held 1 year or less
- Held over 1 year but not over 2 years
- Held over 2 years but not over 5 years
- Held over 5 years but not over 10 years
- Held over 10 years

Total gains and losses. If the total gains and losses are not stated, the net capital gain or loss is the amount shown on line 10 of the Form 1041, 1042, or 1043.

SCHEDULE E. INCOME FROM DIVIDENDS

Include all dividends received during the year, stating name, title and nature and address of corporation declaring the dividend.

SCHEDULE F. EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 13, 14, AND 15

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES C AND D

1. Kind of property	2. Date acquired	3. Date disposed	4. Description of property	5. Description of property	6. Description of property	7. Description of property	8. Description of property	9. Description of property	10. Description of property
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EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC. CLAIMED IN SCHEDULES C AND D, ITEM 12

1. Kind of property	2. Date acquired	3. Date disposed	4. Description of property	5. Description of property	6. Description of property	7. Description of property	8. Description of property	9. Description of property	10. Description of property
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PETITIONER'S AND RESPONDER'S

1. Description of Property 2. Date Acquired 3. Date of Disposition 4. Amount Received 5. Basis 6. Gain or Loss 7. Capital Gain or Loss 8. Other Information

- *Held 1 year or less
- *Held over 1 year but not over 2 years
- *Held over 2 years but not over 5 years
- *Held over 5 years but not over 10 years
- *Held over 10 years

The taxpayer is required to report the sale of property on this form. The form must be filed with the taxpayer's return for the year in which the property was sold. The form must be filed for each sale of property, regardless of whether the sale results in a gain or a loss. The form must be filed for each sale of property, regardless of whether the sale results in a gain or a loss.

SCHEDULE D - INCOME FROM DIVIDENDS

Report all dividends received during the year, stating amounts and names and addresses of corporations from which the dividends were received.

SCHEDULE E - EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 13, 14, AND 15

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES C AND D

1. Kind of Property (If buildings, state material or work acquired)	2. Date Acquired	3. Cost or Other Basis (Indicate basis)	4. Useful Life (Indicate in years)	5. Depreciation Allowed (See instructions)	6. Remaining Cost or Other Basis (See instructions)	7. Life Span (Indicate in years)	8. Estimated Salvage Value (Indicate in dollars)	9. Depreciation Allowed (See instructions)
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EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE C AND IN ITEM 12

1. Kind of Property	2. Date Acquired	3. Date of Loss	4. Description of Loss (Indicate cause)	5. Insurance Proceeds (Indicate amount)	6. Uninsured Loss (Indicate amount)	7. Depreciation Allowed (See instructions)
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AFFIDAVIT (See Instruction 25)

I, the undersigned, declare that the information furnished on this return is true and correct to the best of my knowledge and belief, and I am not aware of any information that would cause this return to be considered false or fraudulent.

Signature of Taxpayer

NOTARY
SEAL

AFFIDAVIT (See Instruction 25)

I, the undersigned, declare that the information furnished on this return is true and correct to the best of my knowledge and belief, and I am not aware of any information that would cause this return to be considered false or fraudulent.

Signature of Taxpayer

NOTARY
SEAL

FORM 1041 MUST BE FILED WITH THIS RETURN

FIDUCIARY RETURN OF INCOME

For Calendar Year 1934

350116

NAME OF TRUST OR ESTATE **George B. Clifford, Jr. Trust**

MINNESOTA

NAME OF TRUSTEE **George B. Clifford, Jr., Trustee**

ADDRESS OF TRUSTEE **614 Security Building
Minneapolis, Minnesota.**

Was the return filed on behalf of the estate or trust? **No**

Has the return been filed on behalf of the estate or trust? **No**

Have all of the required information and statements required by Instruction 22 been previously furnished, state when and to whom? **Yes with Form 709, Gift Tax Return on March 15, 1935.**

What kind of income is received or accrued? **Cash**

Did any person or persons receive any part of the income or property affecting any return or returns? **Yes**

Has the nature of the income or property received or accrued been previously reported to the Commissioner? **Yes**

Has the nature of the income or property received or accrued been previously reported to the Commissioner? **No**

INCOME

1. Income from Bonds, Stocks, etc. **235 31**

2. Income from Dividends, etc. **300 00**

3. Income from Partnerships, etc. **1,310 20**

4. Income from Real Estate, etc. **8,000 00**

DEDUCTIONS

1. Interest Paid **18**

2. Taxes Paid **11 20**

3. Charitable Contributions **30 40**

4. Other Deductions **11 20**

BENEFICIARIES; SHARES OF INCOME AND CREDITS

1. **George B. Clifford, Jr. Trust**

2. **614 Security Building**

3. **Minneapolis, Minn.**

4. **George B. Clifford, Jr. Trust**

5. **614 Security Building**

PETITIONER'S AND RESPONDENT'S

[illegible]**SCHEDULE B - INCOME FROM DIVIDENDS**

For the full dividends received during the year, stating amounts and names and addresses of corporations declaring the dividends

SCHEDULE E - EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 13, 14, AND 15

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND H

1. NAME OF THE COMPANY	2. NAME OF THE COMPANY	3. NAME OF THE COMPANY	4. NAME OF THE COMPANY	5. NAME OF THE COMPANY	6. NAME OF THE COMPANY	7. NAME OF THE COMPANY	8. NAME OF THE COMPANY
1. NAME OF THE COMPANY	2. NAME OF THE COMPANY	3. NAME OF THE COMPANY	4. NAME OF THE COMPANY	5. NAME OF THE COMPANY	6. NAME OF THE COMPANY	7. NAME OF THE COMPANY	8. NAME OF THE COMPANY

* EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A AND IN ITEM 12

[illegible]**AFFIDAVIT** (See Instruction 25)

I declare under penalty of perjury that this return (including its accompanying schedules and statements) is true, correct, and complete to the best of my knowledge and belief, and that I have not omitted to report any income that is reportable under the Internal Revenue Code or to include any information that is required by the Regulations under the Internal Revenue Code.

2. 5. 1972. 6. 10. 1972. 11. 10. 1972. 12. 10. 1972. 1. 11. 1972. 2. 11. 1972. 3. 11. 1972. 4. 11. 1972. 5. 11. 1972. 6. 11. 1972. 7. 11. 1972. 8. 11. 1972. 9. 11. 1972. 10. 11. 1972. 11. 11. 1972. 12. 11. 1972. 1. 12. 1972. 2. 12. 1972. 3. 12. 1972. 4. 12. 1972. 5. 12. 1972. 6. 12. 1972. 7. 12. 1972. 8. 12. 1972. 9. 12. 1972. 10. 12. 1972. 11. 12. 1972. 12. 12. 1972. 1. 1. 1973. 2. 1. 1973. 3. 1. 1973. 4. 1. 1973. 5. 1. 1973. 6. 1. 1973. 7. 1. 1973. 8. 1. 1973. 9. 1. 1973. 10. 1. 1973. 11. 1. 1973. 12. 1. 1973. 1. 2. 1973. 2. 2. 1973. 3. 2. 1973. 4. 2. 1973. 5. 2. 1973. 6. 2. 1973. 7. 2. 1973. 8. 2. 1973. 9. 2. 1973. 10. 2. 1973. 11. 2. 1973. 12. 2. 1973. 1. 3. 1973. 2. 3. 1973. 3. 3. 1973. 4. 3. 1973. 5. 3. 1973. 6. 3. 1973. 7. 3. 1973. 8. 3. 1973. 9. 3. 1973. 10. 3. 1973. 11. 3. 1973. 12. 3. 1973. 1. 4. 1973. 2. 4. 1973. 3. 4. 1973. 4. 4. 1973. 5. 4. 1973. 6. 4. 1973. 7. 4. 1973. 8. 4. 1973. 9. 4. 1973. 10. 4. 1973. 11. 4. 1973. 12. 4. 1973. 1. 5. 1973. 2. 5. 1973. 3. 5. 1973. 4. 5. 1973. 5. 5. 1973. 6. 5. 1973. 7. 5. 1973. 8. 5. 1973. 9. 5. 1973. 10. 5. 1973. 11. 5. 1973. 12. 5. 1973. 1. 6. 1973. 2. 6. 1973. 3. 6. 1973. 4. 6. 1973. 5. 6. 1973. 6. 6. 1973. 7. 6. 1973. 8. 6. 1973. 9. 6. 1973. 10. 6. 1973. 11. 6. 1973. 12. 6. 1973. 1. 7. 1973. 2. 7. 1973. 3. 7. 1973. 4. 7. 1973. 5. 7. 1973. 6. 7. 1973. 7. 7. 1973. 8. 7. 1973. 9. 7. 1973. 10. 7. 1973. 11. 7. 1973. 12. 7. 1973. 1. 8. 1973. 2. 8. 1973. 3. 8. 1973. 4. 8. 1973. 5. 8. 1973. 6. 8. 1973. 7. 8. 1973. 8. 8. 1973. 9. 8. 1973. 10. 8. 1973. 11. 8. 1973. 12. 8. 1973. 1. 9. 1973. 2. 9. 1973. 3. 9. 1973. 4. 9. 1973. 5. 9. 1973. 6. 9. 1973. 7. 9. 1973. 8. 9. 1973. 9. 9. 1973. 10. 9. 1973. 11. 9. 1973. 12. 9. 1973. 1. 10. 1973. 2. 10. 1973. 3. 10. 1973. 4. 10. 1973. 5. 10. 1973. 6. 10. 1973. 7. 10. 1973. 8. 10. 1973. 9. 10. 1973. 10. 10. 1973. 11. 10. 1973. 12. 10. 1973. 1. 11. 1973. 2. 11. 1973. 3. 11. 1973. 4. 11. 1973. 5. 11. 1973. 6. 11. 1973. 7. 11. 1973. 8. 11. 1973. 9. 11. 1973. 10. 11. 1973. 11. 11. 1973. 12. 11. 1973. 1. 12. 1973. 2. 12. 1973. 3. 12. 1973. 4. 12. 1973. 5. 12. 1973. 6. 12. 1973. 7. 12. 1973. 8. 12. 1973. 9. 12. 1973. 10. 12. 1973. 11. 12. 1973. 12. 12. 1973. 1. 1. 1974. 2. 1. 1974. 3. 1. 1974. 4. 1. 1974. 5. 1. 1974. 6. 1. 1974. 7. 1. 1974. 8. 1. 1974. 9. 1. 1974. 10. 1. 1974. 11. 1. 1974. 12. 1. 1974. 1. 2. 1974. 2. 2. 1974. 3. 2. 1974. 4. 2. 1974. 5. 2. 1974. 6. 2. 1974. 7. 2. 1974. 8. 2. 1974. 9. 2. 1974. 10. 2. 1974. 11. 2. 1974. 12. 2. 1974. 1. 3. 1974. 2. 3. 1974. 3. 3. 1974. 4. 3. 1974. 5. 3. 1974. 6. 3. 1974. 7. 3. 1974. 8. 3. 1974. 9. 3. 1974. 10. 3. 1974. 11. 3. 1974. 12. 3. 1974. 1. 4. 1974. 2. 4. 1974. 3. 4. 1974. 4. 4. 1974. 5. 4. 1974. 6. 4. 1974. 7. 4. 1974. 8. 4. 1974. 9. 4. 1974. 10. 4. 1974. 11. 4. 1974. 12. 4. 1974. 1. 5. 1974. 2. 5. 1974. 3. 5. 1974. 4. 5. 1974. 5. 5. 1974. 6. 5. 1974. 7. 5. 1974. 8. 5. 1974. 9. 5. 1974. 10. 5. 1974. 11. 5. 1974. 12. 5. 1974. 1. 6. 1974. 2. 6. 1974. 3. 6. 1974. 4. 6. 1974. 5. 6. 1974. 6. 6. 1974. 7. 6. 1974. 8. 6. 1974. 9. 6. 1974. 10. 6. 1974. 11. 6. 1974. 12. 6. 1974. 1. 7. 1974. 2. 7. 1974. 3. 7. 1974. 4. 7. 1974. 5. 7. 1974. 6. 7. 1974. 7. 7. 1974. 8. 7. 1974. 9. 7. 1974. 10. 7. 1974. 11. 7. 1974. 12. 7. 1974. 1. 8. 1974. 2. 8. 1974. 3. 8. 1974. 4. 8. 1974. 5. 8. 1974. 6. 8. 1974. 7. 8. 1974. 8. 8. 1974. 9. 8. 1974. 10. 8. 1974. 11. 8. 1974. 12. 8. 1974. 1. 9. 1974. 2. 9. 1974. 3. 9. 1974. 4. 9. 1974. 5. 9. 1974. 6. 9. 1974. 7. 9. 1974. 8. 9. 1974. 9. 9. 1974. 10. 9. 1974. 11. 9. 1974. 12. 9. 1974. 1. 10. 1974. 2. 10. 1974. 3. 10. 1974. 4. 10. 1974. 5. 10. 1974. 6. 10. 1974. 7. 10. 1974. 8. 10. 1974. 9. 10. 1974. 10. 10. 1974. 11. 10. 1974. 12. 10. 1974. 1. 11. 1974. 2. 11. 1974. 3. 11. 1974. 4. 11. 1974. 5. 11. 1974. 6. 11. 1974. 7. 11. 1974. 8. 11. 1974. 9. 11. 1974. 10. 11. 1974. 11. 11. 1974. 12. 11. 1974. 1. 12. 1974. 2. 12. 1974. 3. 12. 1974. 4. 12. 1974. 5. 12. 1974. 6. 12. 1974. 7. 12. 1974. 8. 12. 1974. 9. 12. 1974. 10. 12. 1974. 11. 12. 1974. 12. 12. 1974. 1. 1. 1975. 2. 1. 1975. 3. 1. 1975. 4. 1. 1975. 5. 1. 1975. 6. 1. 1975. 7. 1. 1975. 8. 1. 1975. 9. 1. 1975. 10. 1. 1975. 11

(Signature of officer administering oath)

AFFIDAVIT (See Instruction 25)

I declare under penalty of perjury that I have prepared this return for the person named herein and that the return including its accompanying schedules and state-
ments, if any, is a true, correct, and complete statement of all the information respecting the income tax liability of the person for whom this return has been
prepared of which I have any knowledge.

Signed to and subscribed before me this 1st day of

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1992-1993

A feature of private language is the extent

... ..

PETITIONER'S AND RESPONDENT'S EXHIBIT B-2

| | |
|------|--------|
| 1.5 | 100.00 |
| 2.5 | 246.20 |
| 10.0 | 100.00 |
| 10.0 | 200.00 |

21.20

FORM 1094 MUST BE FILED WITH THIS RETURN

INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES FROM SALARIES OR WAGES OF MORE THAN \$5,000
AND INCOMES FROM BUSINESS, PROFESSION, RENTS, OR SALE OF PROPERTY

For Calendar Year 1934

or Fiscal year begun 1934 and ended 1934

File This Return Not Later Than the 15th Day of the Third Month Following the Close of the Taxable Year

PRINT NAME AND ADDRESS PLAINLY BELOW

Do Not Write in These Spaces

File
Code

Serial
Number

District

Code



1. State or foreign, or U.S. territory or possession, in which the taxpayer was domiciled during the taxable year.
2. Name of the taxpayer's principal occupation or business during the taxable year.
3. Name of the taxpayer's principal source of income during the taxable year.
4. Name of the taxpayer's principal source of income during the taxable year.

5. Name of the taxpayer's principal source of income during the taxable year.
6. Name of the taxpayer's principal source of income during the taxable year.
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9. Name of the taxpayer's principal source of income during the taxable year.
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11. Name of the taxpayer's principal source of income during the taxable year.
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21. Name of the taxpayer's principal source of income during the taxable year.
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23. Name of the taxpayer's principal source of income during the taxable year.
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26. Name of the taxpayer's principal source of income during the taxable year.
27. Name of the taxpayer's principal source of income during the taxable year.
28. Name of the taxpayer's principal source of income during the taxable year.
29. Name of the taxpayer's principal source of income during the taxable year.
30. Name of the taxpayer's principal source of income during the taxable year.

INCOME

1. Salaries, Wages, Commissions, Fees, etc.
2. Interest on U.S. Bonds, etc.
3. Interest on U.S. Bonds, etc.
4. Interest on U.S. Bonds, etc.
5. Interest on U.S. Bonds, etc.
6. Interest on U.S. Bonds, etc.
7. Interest on U.S. Bonds, etc.
8. Interest on U.S. Bonds, etc.
9. Interest on U.S. Bonds, etc.
10. Interest on U.S. Bonds, etc.
11. Interest on U.S. Bonds, etc.
12. Interest on U.S. Bonds, etc.
13. Interest on U.S. Bonds, etc.
14. Interest on U.S. Bonds, etc.
15. Interest on U.S. Bonds, etc.
16. Interest on U.S. Bonds, etc.
17. Interest on U.S. Bonds, etc.
18. Interest on U.S. Bonds, etc.
19. Interest on U.S. Bonds, etc.
20. Interest on U.S. Bonds, etc.

DEDUCTIONS

1. Interest Paid
2. Taxes Paid
3. Charitable Contributions
4. Gift Taxes
5. Estate Taxes
6. Federal Income Tax
7. State Income Tax
8. Local Income Tax
9. Federal Estate Tax
10. State Estate Tax
11. Local Estate Tax
12. Federal Gift Tax
13. State Gift Tax
14. Local Gift Tax
15. Federal Charitable Contribution
16. State Charitable Contribution
17. Local Charitable Contribution
18. Federal Charitable Contribution
19. State Charitable Contribution
20. Local Charitable Contribution



COMPUTATION OF TAX. See Instruction 21

YOUR TAXES ARE HERE

PETITIONER S. AND RESPONDENT S EXHIBIT C-3

SCHEDULE A INCOME OR LOSS FROM BUSINESS OR PROFESSION

1. Name of business or profession (state and of business)

2. Address of business or profession

3. Date of beginning of business or profession

4. Gross income from business or profession

5. Deductions from gross income

6. Net income or loss from business or profession

7. Total net income or loss from business or profession

8. Signature of taxpayer

9. Date

SCHEDULE B INCOME FROM RENTS AND ROYALTIES

| 1. Name of property | 2. Address of property | 3. Date of acquisition | 4. Date of disposition | 5. Gross income | 6. Deductions | 7. Net income |
|---------------------|------------------------|------------------------|------------------------|-----------------|---------------|---------------|
|---------------------|------------------------|------------------------|------------------------|-----------------|---------------|---------------|

SCHEDULE C CAPITAL GAINS AND LOSSES

| 1. Description of property | 2. Date of acquisition | 3. Date of disposition | 4. Gross gain or loss | 5. Deductions | 6. Net gain or loss |
|----------------------------|------------------------|------------------------|-----------------------|---------------|---------------------|
|----------------------------|------------------------|------------------------|-----------------------|---------------|---------------------|

SCHEDULE D INCOME FROM DEBENTURES

SCHEDULE E EXPLANATION OF DISCREPANCIES

EXPLANATION OF DEFICIENCY OR OVERPAYMENT

PETITIONER'S AND RESPONDENT'S EXHIBIT

SCHEDULE C. CAPITAL GAINS AND LOSSES

| 1. Description of property | 2. Date acquired | 3. Date sold | 4. Cost or other basis | 5. Proceeds from sale | 6. Capital gain or loss | 7. Taxable capital gain or loss | 8. Other information |
|----------------------------|------------------|--------------|------------------------|-----------------------|-------------------------|---------------------------------|----------------------|
| | | | | | | | |

11. PUBLIC UTILITY INTEREST IN EVIDENCE BONDS AND OTHER OBLIGATIONS OR SECURITIES

SCHEDULE E. INCOME FROM DIVIDENDS

SCHEDULE F. EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, AND 12

EXPLANATION OF DEDUCTIONS FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

EXPLANATION OF DEDUCTIONS FOR INTEREST ON HOME EQUITY CLAIMED IN SCHEDULE A AND IN ITEM 11

PETITIONER'S AND RESPONDENT'S EXHIBIT C-3

In United States Circuit Court of Appeals for the Eighth Circuit

[Title omitted.]

Statement of evidence

Filed January 31, 1939

The following is a statement of evidence submitted to and proceedings had at the hearing before the Board of Tax Appeals in the above entitled cause.

This case came on for hearing before the Honorable Clarence V. Oppen, Member of the United States Board of Tax Appeals, on the 20th day of June 1938, at St. Paul, Minnesota. Thomas P. Helmey, Esq., appeared for the petitioners on review, and W. Frank Gibbs, Esq., Bureau of Internal Revenue, and Honorable J. P. Wenchel, Chief Counsel for the Bureau of Internal Revenue, appeared for the respondent on review.

Offers in evidence

Counsel for respondent on review offered in evidence an original and one copy of stipulation as to facts. The Member of the Board of Tax Appeals sitting in this case then received the stipulation in evidence, but it was not marked as an exhibit. The stipulation as to facts is incorporated herein and made a part hereof by this reference.

Thereupon, there was offered, and the Member received in evidence, the following exhibits:

Petitioner's and Respondent's Exhibit A-1

Fiduciary return for the period January 1, 1934, to June 19, 1934, by George B. Clifford, Jr., Trust of September 22, 1933, George B. Clifford, Jr., Trustee.

Petitioner's and Respondent's Exhibit B-2

Fiduciary return for the period June 20, 1934, to December 31, 1934, of George B. Clifford, Jr., Trust of June 20, 1934, George B. Clifford, Jr., Trustee.

Petitioner's and Respondent's Exhibit C-3

Income-tax return for the period June 20, 1934, to December 31, 1934, of the George B. Clifford, Jr., Trust of June 20, 1934, George B. Clifford, Jr., Trustee. (This is income-tax return, while Exhibit B-2 is the fiduciary return of the Trust of June 20, 1934.)

Petitioner's and Respondent's Exhibit D-4

Individual income-tax return for the calendar year 1934 of George B. Clifford, Jr.

Petitioner's and Respondent's Exhibit E-5

Individual income-tax return for the calendar year 1934 of Virginia Clifford.

Counsel for petitioner on review made a motion for judgment in favor of the petitioner on the ground that the evidence as embodied in the stipulation and also in the exhibits received in evidence entitled the petitioner to the judgment of the Board as a matter of law, that no other conclusion could be sustained by the evidence submitted in the stipulation and by the exhibits. The Member took the motion under advisement.

Approval of statement of evidence by counsel for respondent on review

The foregoing, together with the stipulation as to facts, and Joint Exhibits A-1, B-2, C-3, D-4, and E-5, is all of the evidence material upon appeal adduced at the hearing before the United States Board of Tax Appeals, and the same is approved by the undersigned, as attorney for the petitioner on review.

THOMAS P. HELMEY,

Attorney for Respondent on Review George B. Clifford, Jr.

Approval of statement of evidence by counsel for Commissioner of Internal Revenue

The foregoing, together with the stipulation as to facts and Joint Exhibits A-1, B-2, C-3, D-4, and E-5 is all of the evidence material upon appeal adduced at the hearing before the United States Board of Tax Appeals, and the same is approved by the undersigned, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, as attorney for the Commissioner of Internal Revenue.

J. P. WENCHEL,

Chief Counsel,

Bureau of Internal Revenue,

Attorney for Respondent Commissioner of Internal Revenue.

Order approving statement of evidence

I hereby certify that the foregoing Statement of Evidence has been examined by me and found conformable to the truth and to contain all of the evidence in said case.

The foregoing Statement of Evidence is hereby approved and assigned and ordered to be made a part of the record in the above-entitled cause this 31st day of January 1939.

CLARENCE V. OPPER,

FORM 1041 MUST BE FILED WITH THIS RETURN.

INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES FROM SALARIES OR WAGES OF MORE THAN \$5,000
AND INCOMES FROM BUSINESS, PROFESSION, RENTS, OR SALE OF PROPERTY

For Calendar Year 1934

or fiscal year begun 1934, and ended 1935
File This Return Not Later Than the 15th Day of the Third Month Following the Close of the Taxable Year

PRINT NAME AND ADDRESS PLAINLY BELOW

W. P. A.
SECURITY BUILDING
MINNEAPOLIS, MINN.
STATE

Do Not Write in These Spaces

File
Code
Serial
Number

Index



First Payment

12-22-34

902
2909.41

1. State whether you are (a) a resident of the United States, or (b) a non-resident alien.
2. Have you had a return for this year filed in a State, Territory, or Possession?
3. Have you married and the married couple are filing a joint return?
4. If the 1934 year began (a) on 1-1-34, or (b) on 1-1-35, or (c) on 1-1-36, or (d) on 1-1-37, or (e) on 1-1-38, or (f) on 1-1-39, or (g) on 1-1-40, or (h) on 1-1-41, or (i) on 1-1-42, or (j) on 1-1-43, or (k) on 1-1-44, or (l) on 1-1-45, or (m) on 1-1-46, or (n) on 1-1-47, or (o) on 1-1-48, or (p) on 1-1-49, or (q) on 1-1-50, or (r) on 1-1-51, or (s) on 1-1-52, or (t) on 1-1-53, or (u) on 1-1-54, or (v) on 1-1-55, or (w) on 1-1-56, or (x) on 1-1-57, or (y) on 1-1-58, or (z) on 1-1-59, or (aa) on 1-1-60, or (ab) on 1-1-61, or (ac) on 1-1-62, or (ad) on 1-1-63, or (ae) on 1-1-64, or (af) on 1-1-65, or (ag) on 1-1-66, or (ah) on 1-1-67, or (ai) on 1-1-68, or (aj) on 1-1-69, or (ak) on 1-1-70, or (al) on 1-1-71, or (am) on 1-1-72, or (an) on 1-1-73, or (ao) on 1-1-74, or (ap) on 1-1-75, or (aq) on 1-1-76, or (ar) on 1-1-77, or (as) on 1-1-78, or (at) on 1-1-79, or (au) on 1-1-80, or (av) on 1-1-81, or (aw) on 1-1-82, or (ax) on 1-1-83, or (ay) on 1-1-84, or (az) on 1-1-85, or (ba) on 1-1-86, or (bb) on 1-1-87, or (bc) on 1-1-88, or (bd) on 1-1-89, or (be) on 1-1-90, or (bf) on 1-1-91, or (bg) on 1-1-92, or (bh) on 1-1-93, or (bi) on 1-1-94, or (bj) on 1-1-95, or (bk) on 1-1-96, or (bl) on 1-1-97, or (bm) on 1-1-98, or (bn) on 1-1-99, or (bo) on 1-1-00, or (bp) on 1-1-01, or (bq) on 1-1-02, or (br) on 1-1-03, or (bs) on 1-1-04, or (bt) on 1-1-05, or (bu) on 1-1-06, or (bv) on 1-1-07, or (bw) on 1-1-08, or (bx) on 1-1-09, or (by) on 1-1-10, or (bz) on 1-1-11, or (ca) on 1-1-12, or (cb) on 1-1-13, or (cc) on 1-1-14, or (cd) on 1-1-15, or (ce) on 1-1-16, or (cf) on 1-1-17, or (cg) on 1-1-18, or (ch) on 1-1-19, or (ci) on 1-1-20, or (cj) on 1-1-21, or (ck) on 1-1-22, or (cl) on 1-1-23, or (cm) on 1-1-24, or (cn) on 1-1-25, or (co) on 1-1-26, or (cp) on 1-1-27, or (cq) on 1-1-28, or (cr) on 1-1-29, or (cs) on 1-1-30, or (ct) on 1-1-31, or (cu) on 1-1-32, or (cv) on 1-1-33, or (cw) on 1-1-34, or (cx) on 1-1-35, or (cy) on 1-1-36, or (cz) on 1-1-37, or (da) on 1-1-38, or (db) on 1-1-39, or (dc) on 1-1-40, or (dd) on 1-1-41, or (de) on 1-1-42, or (df) on 1-1-43, or (dg) on 1-1-44, or (dh) on 1-1-45, or (di) on 1-1-46, or (dj) on 1-1-47, or (dk) on 1-1-48, or (dl) on 1-1-49, or (dm) on 1-1-50, or (dn) on 1-1-51, or (do) on 1-1-52, or (dp) on 1-1-53, or (dq) on 1-1-54, or (dr) on 1-1-55, or (ds) on 1-1-56, or (dt) on 1-1-57, or (du) on 1-1-58, or (dv) on 1-1-59, or (dw) on 1-1-60, or (dx) on 1-1-61, or (dy) on 1-1-62, or (dz) on 1-1-63, or (ea) on 1-1-64, or (eb) on 1-1-65, or (ec) on 1-1-66, or (ed) on 1-1-67, or (ee) on 1-1-68, or (ef) on 1-1-69, or (eg) on 1-1-70, or (eh) on 1-1-71, or (ei) on 1-1-72, or (ej) on 1-1-73, or (ek) on 1-1-74, or (el) on 1-1-75, or (em) on 1-1-76, or (en) on 1-1-77, or (eo) on 1-1-78, or (ep) on 1-1-79, or (eq) on 1-1-80, or (er) on 1-1-81, or (es) on 1-1-82, or (et) on 1-1-83, or (eu) on 1-1-84, or (ev) on 1-1-85, or (ew) on 1-1-86, or (ex) on 1-1-87, or (ey) on 1-1-88, or (ez) on 1-1-89, or (fa) on 1-1-90, or (fb) on 1-1-91, or 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1-1-49, or (lm) on 1-1-50, or (ln) on 1-1-51, or (lo) on 1-1-52, or (lp) on 1-1-53, or (lq) on 1-1-54, or (lr) on 1-1-55, or (ls) on 1-1-56, or (lt) on 1-1-57, or (lu) on 1-1-58, or (lv) on 1-1-59, or (lw) on 1-1-60, or (lx) on 1-1-61, or (ly) on 1-1-62, or (lz) on 1-1-63, or (ma) on 1-1-64, or (mb) on 1-1-65, or (mc) on 1-1-66, or (md) on 1-1-67, or (me) on 1-1-68, or (mf) on 1-1-69, or (mg) on 1-1-70, or (mh) on 1-1-71, or (mi) on 1-1-72, or (mj) on 1-1-73, or (mk) on 1-1-74, or (ml) on 1-1-75, or (mm) on 1-1-76, or (mn) on 1-1-77, or (mo) on 1-1-78, or (mp) on 1-1-79, or (mq) on 1-1-80, or (mr) on 1-1-81, or (ms) on 1-1-82, or (mt) on 1-1-83, or (mu) on 1-1-84, or (mv) on 1-1-85, or (mw) on 1-1-86, or (mx) on 1-1-87, or (my) on 1-1-88, or (mz) on 1-1-89, or (na) on 1-1-90, or (nb) on 1-1-91, or (nc) on 1-1-92, or (nd) on 1-1-93, or (ne) on 1-1-94, or (nf) on 1-1-95, or (ng) on 1-1-96, or (nh) on 1-1-97, or (ni) on 1-1-98, or (nj) on 1-1-99, or (no) on 1-1-00, or (np) on 1-1-01, or (nq) on 1-1-02, or (nr) on 1-1-03, or (ns) on 1-1-04, or (nt) on 1-1-05, or (nu) on 1-1-06, or (nv) on 1-1-07, or (nw) on 1-1-08, or (nx) on 1-1-09, or (ny) on 1-1-10, or (nz) on 1-1-11, or (oa) on 1-1-12, or (ob) on 1-1-13, or (oc) on 1-1-14, or (od) on 1-1-15, or (oe) on 1-1-16, or (of) on 1-1-17, or (og) on 1-1-18, or (oh) on 1-1-19, or (oi) on 1-1-20, or (oj) on 1-1-21, or (ok) on 1-1-22, or (ol) on 1-1-23, or (om) on 1-1-24, or (on) on 1-1-25, or (oo) on 1-1-26, or (op) on 1-1-27, or (oq) on 1-1-28, or (or) on 1-1-29, or (os) on 1-1-30, or (ot) on 1-1-31, or (ou) on 1-1-32, or (ov) on 1-1-33, or (ow) on 1-1-34, or (ox) on 1-1-35, or (oy) on 1-1-36, or (oz) on 1-1-37, or (pa) on 1-1-38, or (pb) on 1-1-39, or (pc) on 1-1-40, or (pd) on 1-1-41, or (pe) on 1-1-42, or (pf) on 1-1-43, or (pg) on 1-1-44, or (ph) on 1-1-45, or (pi) on 1-1-46, or (pj) on 1-1-47, or (pk) on 1-1-48, or (pl) on 1-1-49, or (pm) on 1-1-50, or (pn) on 1-1-51, or (po) on 1-1-52, or (pp) on 1-1-53, or (pq) on 1-1-54, or (pr) on 1-1-55, or (ps) on 1-1-56, or (pt) on 1-1-57, or (pu) on 1-1-58, or (pv) on 1-1-59, or (pw) on 1-1-60, or (px) on 1-1-61, or (py) on 1-1-62, or (pz) on 1-1-63, or (qa) on 1-1-64, or (qb) on 1-1-65, or (qc) on 1-1-66, or (qd) on 1-1-67, or (qe) on 1-1-68, or (qf) on 1-1-69, or (qg) on 1-1-70, or (qh) on 1-1-71, or (qi) on 1-1-72, or (qj) on 1-1-73, or (qk) on 1-1-74, or (ql) on 1-1-75, or (qm) on 1-1-76, or (qn) on 1-1-77, or (qo) on 1-1-78, or (qp) on 1-1-79, or (qq) on 1-1-80, or (qr) on 1-1-81, or (qs) on 1-1-82, or (qt) on 1-1-83, or (qu) on 1-1-84, or (qv) on 1-1-85, or (qw) on 1-1-86, or (qx) on 1-1-87, or (qy) on 1-1-88, or (qz) on 1-1-89, or (ra) on 1-1-90, or (rb) on 1-1-91, or (rc) on 1-1-92, or (rd) on 1-1-93, or (re) on 1-1-94, or (rf) on 1-1-95, or (rg) on 1-1-96, or (rh) on 1-1-97, or (ri) on 1-1-98, or (rj) on 1-1-99, or (ro) on 1-1-00, or (rp) on 1-1-01, or (rq) on 1-1-02, or (rr) on 1-1-03, or (rs) on 1-1-04, or (rt) on 1-1-05, or (ru) on 1-1-06, or (rv) on 1-1-07, or (rw) on 1-1-08, or (rx) on 1-1-09, or (ry) on 1-1-10, or (rz) on 1-1-11, or (sa) on 1-1-12, or (sb) on 1-1-13, or (sc) on 1-1-14, or (sd) on 1-1-15, or (se) on 1-1-16, or (sf) on 1-1-17, or (sg) on 1-1-18, or (sh) on 1-1-19, or (si) on 1-1-20, or (sj) on 1-1-21, or (sk) on 1-1-22, or (sl) on 1-1-23, or (sm) on 1-1-24, or (sn) on 1-1-25, or (so) on 1-1-26, or (sp) on 1-1-27, or (sq) on 1-1-28, or (sr) on 1-1-29, or (ss) on 1-1-30, or (st) on 1-1-31, or (su) on 1-1-32, or (sv) on 1-1-33, or (sw) on 1-1-34, or (sx) on 1-1-35, or (sy) on 1-1-36, or (sz) on 1-1-37, or (ta) on 1-1-38, or (tb) on 1-1-39, or (tc) on 1-1-40, or (td) on 1-1-41, or (te) on 1-1-42, or (tf) on 1-1-43, or (tg) on 1-1-44, or (th) on 1-1-45, or (ti) on 1-1-46, or (tj) on 1-1-47, or (tk) on 1-1-48, or (tl) on 1-1-49, or (tm) on 1-1-50, or (tn) on 1-1-51, or (to) on 1-1-52, or (tp) on 1-1-53, or (tq) on 1-1-54, or (tr) on 1-1-55, or (ts) on 1-1-56, or (tt) on 1-1-57, or (tu) on 1-1-58, or (tv) on 1-1-59, or (tw) on 1-1-60, or (tx) on 1-1-61, or (ty) on 1-1-62, or (tz) on 1-1-63, or (ua) on 1-1-64, or (ub) on 1-1-65, or (uc) on 1-1-66, or (ud) on 1-1-67, or (ue) on 1-1-68, or (uf) on 1-1-69, or (ug) on 1-1-70, or (uh) on 1-1-71, or (ui) on 1-1-72, or (uj) on 1-1-73, or (uk) on 1-1-74, or (ul) on 1-1-75, or (um) on 1-1-76, or (un) on 1-1-77, or (uo) on 1-1-78, or (up) on 1-1-79, or (uq) on 1-1-80, or (ur) on 1-1-81, or (us) on 1-1-82, or (ut) on 1-1-83, or (uu) on 1-1-84, or (uv) on 1-1-85, or (uw) on 1-1-86, or (ux) on 1-1-87, or (uy) on 1-1-88, or (uz) on 1-1-89, or (va) on 1-1-90, or (vb) on 1-1-91, or (vc) on 1-1-92, or (vd) on 1-1-93, or (ve) on 1-1-94, or (vf) on 1-1-95, or (vg) on 1-1-96, or (vh) on 1-1-97, or (vi) on 1-1-98, or (vj) on 1-1-99, or (vo) on 1-1-00, or (vp) on 1-1-01, or (vq) on 1-1-02, or (vr) on 1-1-03, or (vs) on 1-1-04, or (vt) on 1-1-05, or (vu) on 1-1-06, or (vv) on 1-1-07, or (vw) on 1-1-08, or (vx) on 1-1-09, or (vy) on 1-1-10, or (vz) on 1-1-11, or (wa) on 1-1-12, or (wb) on 1-1-13, or (wc) on 1-1-14, or (wd) on 1-1-15, or (we) on 1-1-16, or (wf) on 1-1-17, or (wg) on 1-1-18, or (wh) on 1-1-19, or (wi) on 1-1-20, or (wj) on 1-1-21, or (wk) on 1-1-22, or (wl) on 1-1-23, or (wm) on 1-1-24, or (wn) on 1-1-25, or (wo) on 1-1-26, or (wp) on 1-1-27, or (wq) on 1-1-28, or (wr) on 1-1-29, or (ws) on 1-1-30, or (wt) on 1-1-31, or (wu) on 1-1-32, or (wv) on 1-1-33, or (ww) on 1-1-34, or (wx) on 1-1-35, or (wy) on 1-1-36, or (wz) on 1-1-37, or (xa) on 1-1-38, or (xb) on 1-1-39, or (xc) on 1-1-40, or (xd) on 1-1-41, or (xe) on 1-1-42, or (xf) on 1-1-43, or (xg) on 1-1-44, or (xh) on 1-1-45, or (xi) on 1-1-46, or (xj) on 1-1-47, or (xk) on 1-1-48, or (xl) on 1-1-49, or (xm) on 1-1-50, or (xn) on 1-1-51, or (xo) on 1-1-52, or (xp) on 1-1-53, or (xq) on 1-1-54, or (xr) on 1-1-55, or (xs) on 1-1-56, or (xt) on 1-1-57, or (xu) on 1-1-58, or (xv) on 1-1-59, or (xw) on 1-1-60, or (xx) on 1-1-61, or (xy) on 1-1-62, or (xz) on 1-1-63, or (ya) on 1-1-64, or (yb) on 1-1-65, or (yc) on 1-1-66, or (yd) on 1-1-67, or (ye) on 1-1-68, or (yf) on 1-1-69, or (yg) on 1-1-70, or (yh) on 1-1-71, or (yi) on 1-1-72, or (yj) on 1-1-73, or (yk) on 1-1-74, or (yl) on 1-1-75, or (ym) on 1-1-76, or (yn) on 1-1-77, or (yo) on 1-1-78, or (yp) on 1-1-79, or (yq) on 1-1-80, or (yr) on 1-1-81, or (ys) on 1-1-82, or (yt) on 1-1-83, or (yu) on 1-1-84, or (yv) on 1-1-85, or (yw) on 1-1-86, or (yx) on 1-1-87, or (yy) on 1-1-88, or (yz) on 1-1-89, or (za) on 1-1-90, or (zb) on 1-1-91, or (zc) on 1-1-92, or (zd) on 1-1-93, or (ze) on 1-1-94, or (zf) on 1-1-95, or (zg) on 1-1-96, or (zh) on 1-1-97, or (zi) on 1-1-98, or (zj) on 1-1-99, or (zo) on 1-1-00, or (zp) on 1-1-01, or (zq) on 1-1-02, or (zr) on 1-1-03, or (zs) on 1-1-04, or (zt) on 1-1-05, or (zu) on 1-1-06, or (zv) on 1-1-07, or (zw) on 1-1-08, or (zx) on 1-1-09, or (zy) on 1-1-10, or (zz) on 1-1-11.

INCOME

1. Salaries, Wages, Commissions, Fees, etc. (From Schedule A)
2. Income (or Loss) from Business or Profession (From Schedule B)
3. Interest on Bank Deposits, Notes, Corporation Bonds, etc. (except interest on tax-free covenant bonds)
4. Interest on Tax-Free Covenant Bonds upon Which a Tax was Paid at Source
5. Income (or Loss) from Partnerships, Syndicates, Pools, etc. (State name, address, and kind of business)
6. Income from Real Estate (State name and address, and kind of property)
7. Rents and Royalties (From Schedule C)
8. Capital Gain (or Loss) (From Schedule D)
9. Taxable Interest on Liberty Bonds, etc. (From Schedule E)
10. Dividends on Stock of (a) Domestic Corporations subject to taxation under Title I of 1934 Act (b) Domestic Corporations not subject to taxation under Title I of 1934 Act (c) Foreign Corporations
11. Other Income (State source; if separate schedule, if necessary)
12. Total Income (Items 1 to 11)

DEDUCTIONS

13. Interest Paid (Explain in Schedule F)
14. Taxes Paid (Explain in Schedule F)
15. Losses by Fire, Marine, etc. (Explain in Schedule F)
16. Charitable Contributions (Explain in Schedule F)
17. Contributions to United States Savings Bonds (Explain in Schedule F)
18. Other Deductions (Explain in Schedule F)
19. Total Deductions (Items 13 to 18)
20. Net Income (Item 12 minus Item 19)

COMPUTATION OF TAX (See Instruction 21)

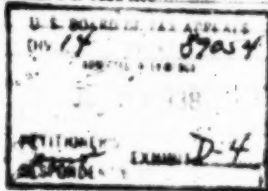
21. Net income (Item 20 above)
22. Less: Personal exemption
23. Credit for Dependents
24. Taxable (Surplus) net income
25. Less: (a) Credit on Liberty Bonds (b) Credit on U.S. Savings Bonds (c) Credit on U.S. War Bonds (d) Credit on U.S. Government Bonds (e) Credit on U.S. Government Securities (f) Credit on U.S. Government Obligations (g) Credit on U.S. Government Notes (h) Credit on U.S. Government Debentures (i) Credit on U.S. Government Bonds (j) Credit on U.S. Government Securities (k) Credit on U.S. Government Obligations (l) Credit on U.S. Government Notes (m) Credit on U.S. Government Debentures (n) Credit on U.S. Government Bonds (o) Credit on U.S. Government Securities (p) Credit on U.S. Government Obligations (q) Credit on U.S. Government Notes (r) Credit on U.S. Government Debentures (s) Credit on U.S. Government Bonds (t) Credit on U.S. Government Securities (u) Credit on U.S. Government Obligations (v) Credit on U.S. Government Notes (w) Credit on U.S. Government Debentures (x) Credit on U.S. Government Bonds (y) Credit on U.S. Government Securities (z) Credit on U.S. Government Obligations 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Securities (ft) Credit on U.S. Government Obligations (fu) Credit on U.S. Government Notes (

Religion, Wages, Compensation, Etc. etc. (From Schedule 1)
 State name and address (From Schedule 1)
 Name and address (From Schedule 1)
 Name and address (From Schedule 1)

1. Income or Loss from Business or Profession (From Schedule 1)
2. Interest on Bank Deposits, Notes, Corporation Bonds, etc. (except interest on tax-free covenant bonds)
3. Interest on Tax-free Covenant Bonds on Which a Tax was Paid at Source
4. Income or Loss from Partnerships, Syndicates, Pools, etc. (State name, address, and kind of business)
5. Income from Pensions, Annuities, etc. (State name and address)
6. Rents and Royalties (From Schedule 2)
7. Capital Gain (or Loss) (From Schedule 3)
8. Taxable Interest on Liberty Bonds, etc. (From Schedule 4)
9. Dividends on Stock of: (a) Domestic Corporations subject to taxation under Title I of 1934 Act
 (b) Domestic Corporations not subject to taxation under Title I of 1934 Act
 (c) Foreign Corporations
10. Other Income (State nature of income and attach schedule if necessary)
11. Total Income (Items 1 to 10)

DEDUCTIONS

12. Interest Paid
13. Taxes Paid (Explain in Schedule 2)
14. Losses by Fire, Storm, etc. (Explain in Schedule 2)
15. Charitable Contributions (Explain in Schedule 2)
16. Other Deductions Authorized by Law (Explain in Schedule 2)
17. Total Deductions (Items 12 to 16)
18. Net Income (Item 11 minus Item 17)



COMPUTATION OF TAX (See Instruction 23)

| | | | |
|--|-----------|--|----------|
| 19. Net Income (Item 18) above | 40,512.48 | Normal tax 4% of Item 18 | 1,620.50 |
| 20. Less: Personal exemption | 2,000.00 | Surplus of Item 21 (See Instruction 23) | 1,620.50 |
| 21. Credit for Income Tax | 2,000.00 | Total tax (Item 19 plus Item 20) | 1,620.50 |
| 22. Balance Surplus net income | 40,512.48 | Less: Income tax paid at source (7% of Item 18) | 2,835.92 |
| 23. Less: Interest on Liberty Bonds, etc. (Item 8) | | Income tax paid to a foreign country (If any) | |
| 24. Surplus (Item 22) above | 40,512.48 | 35. Balance of Tax (Item 21 minus Items 23 and 24) | 1,620.50 |
| 25. Less: Interest on Liberty Bonds, etc. (Item 8) | | | |
| 26. Surplus (Item 24) above | 40,512.48 | | |
| 27. Less: Income tax credit (See Instruction 22) | 2,000.00 | | |
| 28. Balance subject to normal tax | 38,512.48 | | |

Form 1086 filed with return

AFFIDAVIT (See Instruction 27)

I, the undersigned, do hereby certify that this return, including its accompanying schedules and statements of assets, liabilities, and net worth, and the facts of marital and other status, and the facts of the taxpayer's residence, are true, correct, and complete, and that the taxpayer is entitled to the refund of the tax thereon.

Sworn to and subscribed before me this 17th day of June, 1934.



AFFIDAVIT (See Instruction 27)

I, the undersigned, do hereby certify that I have prepared this return for the person or persons named herein and that the return, including its accompanying schedules and statements of assets, liabilities, and net worth, and the facts of marital and other status, and the facts of the taxpayer's residence, are true, correct, and complete, and that the taxpayer is entitled to the refund of the tax thereon.

Sworn to and subscribed before me this 17th day of June, 1934.



AFFIDAVIT (See Instruction 27)

I, the undersigned, do hereby certify that I have prepared this return for the person or persons named herein and that the return, including its accompanying schedules and statements of assets, liabilities, and net worth, and the facts of marital and other status, and the facts of the taxpayer's residence, are true, correct, and complete, and that the taxpayer is entitled to the refund of the tax thereon.

Sworn to and subscribed before me this 17th day of June, 1934.



SCHEDULE A - INCOME (OR LOSS) FROM BUSINESS OR PROFESSION (See Instruction 2)

| | | |
|--|----|--|
| 1 Total receipts from business or profession (state kind of business) | | OTHER BUSINESS DEDUCTIONS |
| 2 Less: Cost of Goods Sold | \$ | 10 Salaries not included as "Wages" in Line 2 (do not deduct compensation for your services) |
| 3 Material and supplies | \$ | 11 Interest on business indebtedness to others |
| 4 Merchandise bought for sale | \$ | 12 Taxes on business and business property |
| 5 Other costs (itemize below or on separate sheet) | \$ | 13 Losses (explain in table at foot of page) |
| 6 Plus inventory at beginning of year | \$ | 14 Bad debts arising from sales or services |
| 7 Total (Lines 2 to 6) | \$ | 15 Depreciation, obsolescence, and depletion (explain in table provided at foot of page) |
| 8 Less inventory at end of year | \$ | 16 Rent, repairs, and other expenses (itemize below or on separate sheet) |
| 9 Net Cost of Goods Sold (Line 7 minus Line 8) | \$ | 17 Total (Lines 10 to 16) |
| Enter "C" or "CM" on Lines 8 and 9 to indicate whether inventories are valued at cost, or cost or market, whichever is lower | | 18 TOTAL DEDUCTIONS, Line 9 plus Line 17 |
| Explanation of deductions claimed on Lines 5 and 16 | | 19 NET PROFIT (OR LOSS), Line 1 minus Line 18 (Enter as Profit) |

SCHEDULE B - INCOME FROM RENTS AND ROYALTIES (See Instruction 7)

| 1 Kind of Property | 2 Amount Received | 3 Cost or Basis at Beginning of Year | 4 Depreciation or Amortization Deduction | 5 Income | 6 Other Income (Royalties) | 7 Total Income |
|--------------------|-------------------|--------------------------------------|--|----------|----------------------------|----------------|
| | \$ | \$ | \$ | \$ | \$ | \$ |

Explanation of deductions claimed on Column 4

SCHEDULE C - CAPITAL GAINS AND LOSSES (See Instructions 8 and 9)

| 1 Description of Property | 2 Date Acquired | 3 Date Disposed | 4 Amount Realized | 5 Basis | 6 Capital Gain or Loss | 7 Short-Term Gain or Loss | 8 Long-Term Gain or Loss |
|---|-----------------|-----------------|-------------------|---------|------------------------|---------------------------|--------------------------|
| * Held 1 year or less | | | \$ | \$ | \$ | \$ | \$ |
| * Held over 1 year but not over 2 years | | | \$ | \$ | \$ | \$ | \$ |
| * Held over 2 years but not over 5 years | | | \$ | \$ | \$ | \$ | \$ |
| * Held over 5 years but not over 10 years | | | \$ | \$ | \$ | \$ | \$ |
| * Held over 10 years | | | \$ | \$ | \$ | \$ | \$ |
| Total Gains and Losses: Total net gain or loss from sales of property is \$ | | | | | | | |

* If reporting sales or exchanges of capital assets, attach separate schedule, Form 8949, to this return. See instructions for details.

SCHEDULE D - INTEREST ON LIBERTY BONDS AND OTHER GOVERNMENT OR SECURITIES

| 1 Name of Issuer | 2 Amount of Interest Received | 3 Date Received | 4 Maturity Date | 5 Type of Security | 6 Total Interest Received |
|------------------|-------------------------------|-----------------|-----------------|--------------------|---------------------------|
| | \$ | | | | \$ |

SCHEDULE E - TAXES ON INVESTMENT INCOME

| 1 Name of Issuer | 2 Amount of Tax Paid | 3 Date Paid | 4 Total Tax Paid |
|------------------|----------------------|-------------|------------------|
| | \$ | | \$ |

SCHEDULE F - EXPLANATION OF DEFERRED TAXES (SEE INSTRUCTIONS 10 AND 11)

| 1 Description of Deferred Tax | 2 Amount of Deferred Tax | 3 Date of Deferral | 4 Total Deferred Tax |
|-------------------------------|--------------------------|--------------------|----------------------|
| | \$ | | \$ |

PETITIONER'S AND RESPONDENT'S

MICRO CARD

TRADE

MARK



22

39



1350

65



SCHEDULE B - INCOME FROM RENTS AND ROYALTIES (See instruction 7)

| 1. Name of Payor | 2. Amount Received | 3. Code on Vol. 4
and March 1, 1975
Worksheet Lines | 4. Description
(explain in column
line of page) | 5. Refund | 6. Other Payments
(Include Cash) | 7. Net Payment
(Column 6 minus 5) |
|------------------|--------------------|---|---|-----------|-------------------------------------|--------------------------------------|
| | 336.00 | | | 22.47 | 313.53 | 313.53 |

Explanation of deductions claimed in Column 6.

SCHEDULE C. CAPITAL GAINS AND LOSSES (See Instructions)

| 1. DESCRIPTION OF PROPERTY | 2. DATE ACQUIRED | 3. DATE SOLD OR EXCHANGED | 4. AMOUNT RECEIVED | 5. COST OR OTHER BASIS | 6. GAIN OR LOSS | 7. TAXES | 8. OTHER | 9. TOTAL |
|---|------------------|---------------------------|--------------------|------------------------|-----------------|----------|----------|----------|
| Held 1 year or less | | | | | | | | |
| Held over 1 year but not over 2 years | | | | | | | | |
| Held over 2 years but not over 5 years | | | | | | | | |
| Held over 5 years but not over 10 years | | | | | | | | |
| Held over 10 years | | | | | | | | |

TOTAL GAINS AND LOSSES: Enter net gain or loss on Item 8. Capital losses are allowed only to the extent of \$2,000 plus capital gains. If a net loss, enter "0".

[illegible]

SCHEDULE D-INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OF SECURITIES See Instruction 5

| SCHEDULE D-INTEREST ON LIBRARY BONDS AND OTHER OBLIGATIONS | | | | AMOUNT PAID | | INCOME FROM DIVIDENDS | |
|--|----------------|--------------------------|--------------------------|----------------|--------------------------|-----------------------|--|
| 1. OBLIGATIONS OR DESCRIPTION | 2. AMOUNT PAID | 3. INCOME FROM DIVIDENDS | 4. INCOME FROM DIVIDENDS | 5. AMOUNT PAID | 6. INCOME FROM DIVIDENDS | | |
| a. Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions. | | | | | | | |
| b. Obligations issued under Federal Farm Loan Act, or under such Act as amended. | | | | | | | |
| c. Liberty Bonds and other obligations of United States government or before September 1, 1917. | | | | | | | |
| d. Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness. | | | | | | | |
| e. Liberty Bonds and Liberty Notes. | | | | | | | |
| f. Obligations of instrumentalities of the United States other than those defined in b, c, d, e, above. | | | | | | | |

SCHEDULE E. INCOME FROM DIVIDENDS

Division of 49 shares received during the year, stating amounts and nature and extent of participation declaring the dividend.

SCHEDULE F EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 14, 16, 17, AND 18

1. The amount claimed is SCHEDULES A AND B

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES 4 AND 5

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED ON ASSETS

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE C AND IN ITEM 15

EXPLANATION OF DEDUCTION FOR LOSSES IN CASES

PETITIONER'S AND RESPONDENT'S EXHIBIT D-4

PETITIONER'S AND RESPONDENT'S EXHIBIT D-4

GEORGE B. CLIFFORD, JR.

1934 Income Tax Return

Schedule "C" -- Capital Gains and Losses

| | Date
Acquired | Date
Sold | Amount
Received | Cost | Gain
Loss | Percent-
age
Used | Gain or
Loss used |
|--|------------------|--------------|--------------------|------------------|-------------------|-------------------------|----------------------|
| West Shore Railway bonds | 12-20-33 | 1-26-34 | 3,848.00 | 3,450.00 | 398.00 | 100% | 398.00 |
| Lincoln Joint Stock Land Bank bonds | 12-6-33 | 2-15-34 | 3,560.00 | 2,550.00 | 950.00 | 100% | 950.00 |
| Denver Joint Stock Land Bank bonds | 12-12-33 | 3-2-34 | 3,500.00 | 2,575.00 | 925.00 | 100% | 925.00 |
| New York Joint Stock Land Bank bonds | 12-6-33 | 3-10-34 | 3,200.00 | 2,525.00 | 675.00 | 100% | 675.00 |
| Walgreen Co. stock | 1-15-34 | 3-20-34 | 2,378.30 | 1,912.50 | 465.80 | 100% | 465.80 |
| Berghoff Brewing Co. stock | 5-13-33 | 4-25-34 | 407.26 | 350.00 | 57.26 | 100% | 57.26 |
| Chicago, Milwaukee & Gary Ry. bonds | 2-1-34 | 5-4-34 | 3,598.00 | 3,400.00 | 198.00 | 100% | 198.00 |
| Holly Sugar Co. bonds | 2-13-34 | 9-18-34 | 4,473.00 | 3,750.00 | 723.00 | 100% | 723.00 |
| Chicago, Terre Haute & S. E. Ry. bonds | 5-4-34 | 6-15-34 | 3,360.50 | 3,778.55 | (418.05) | 100% | (418.05) |
| Chicago, Milwaukee St. P & P Ry bonds | 9-1-33 | 12-11-34 | 689.18 | 2,411.65 | (1,722.47) | 80% | (1,377.98) |
| Northern Pacific Ry. bonds | 6-13-34 | 12-6-34 | 3,482.00 | 3,487.50 | (5.50) | 100% | (5.50) |
| Marshall Field & Co. stock | 9-20-33 | 12-28-34 | 1,020.76 | 1,750.00 | (729.24) | 80% | (583.39) |
| Standard Oil, Indiana, stock | 6-3-33 | 12-28-34 | 2,457.00 | 3,002.50 | (545.50) | 80% | (436.40) |
| Texas Gulf Producing Co. stock | 2-15-34 | 12-28-34 | 775.75 | 1,275.00 | (500.25) | 100% | (499.25) |
| United Gas & Improvement stock | 6-8-33 | 12-28-34 | 1,180.27 | 2,125.00 | (944.73) | 80% | (755.78) |
| Supervised shares | 9-23-33 | 12-29-34 | 2,924.88 | 3,706.00 | (781.12) | 80% | (620.10) |
| U. S. of America Discount bills | 4-27-34 | 5-11-34 | 6,008.90 | 6,000.00 | 8.90 | 100% | |
| Grain trades | 6-28-34 | 7-2-34 | 1,134.80 | 1,500.00 | (365.20) | | 365.20 |
| | | | <u>47,929.70</u> | <u>49,542.70</u> | <u>(1,613.00)</u> | | <u>669.59</u> |

Trust Gains and Losses

| | | | | | | | |
|---------------------------------------|----------|---------|------------------|------------------|-----------------|------|-----------------|
| Land Bryant, Inc. bonds | 12-5-33 | 2-27-34 | 3,498.00 | 2,962.50 | 535.50 | 100% | 535.50 |
| Goodyear Tire & Rubber Co. bonds | 12-21-33 | 3-12-34 | 4,753.50 | 4,412.50 | 373.00 | 100% | 373.00 |
| Fairbanks Morse & Co. bonds | 9-22-33 | 5-4-34 | 1,753.75 | 1,165.00 | 588.75 | 100% | 588.75 |
| Fairbanks Morse & Co. bonds | 9-22-33 | 5-7-34 | 887.80 | 582.50 | 299.30 | 100% | 299.30 |
| Fairbanks Morse & Co. bonds | 9-22-33 | 5-8-34 | 1,753.75 | 1,165.00 | 588.75 | 100% | 588.75 |
| Marshall Field & Co. bonds | 11-15-33 | 6-5-34 | 4,773.00 | 4,362.50 | 410.50 | 100% | 410.50 |
| Youngstown Sheet & Tube Co. bonds | 9-22-33 | 6-15-34 | 4,123.00 | 2,994.76 | 1,128.24 | 100% | 1,128.24 |
| Home Owners Loan Corpn bonds | 10-26-33 | 6-13-34 | 3,318.75 | 2,670.00 | 648.75 | 100% | 348.75 |
| Fuller Building bonds | 9-22-33 | 6-13-34 | 834.20 | 730.00 | 104.20 | 100% | 104.20 |
| Larabee Building bonds | 12-22-33 | 6-15-34 | 994.60 | 915.00 | 79.60 | 100% | 79.60 |
| Chicago Terre Haute & S. E. Ry. bonds | 5-4-34 | 6-15-34 | 3,360.50 | 3,783.40 | (422.90) | 100% | (422.90) |
| | | | <u>29,776.85</u> | <u>25,223.16</u> | <u>4,553.69</u> | | <u>4,903.69</u> |
| | | | | | <u>2,420.69</u> | | <u>3,364.10</u> |

When this document is requested by recipient or within the time specified in
 this notice, the information shall be furnished to the recipient. If the information was
 obtained from a source other than yourself, state the source of
 the information reported in this return and the manner in
 which it was furnished to or obtained by such person or persons.
 William F. Robinson, Inc.

12 List your past 5 years of information on Form 1041 and 1042 (see instruction 81) for the calendar year 1954. (A power "yes" or "no" is required.)

INCOME

| INCOME | | DEDUCTIONS | | TAX | |
|--------|--|------------|--|-----|--------|
| 1 | Salaries, Wages, Commissions, Fees, etc. (State name and address of employer) | | | | |
| 2 | Income (or Loss) from Business or Profession (From Schedule A) | | | | |
| 3 | Interest on Bank Deposits, Notes, Corporation Bonds, etc. (except interest on tax-free covenant bonds) | | | 735 | 58 |
| 4 | Interest on Tax-free Covenant Bonds Upon Which a Tax was Paid at 30% rate | | | 125 | 00 |
| 5 | Income (or Loss) from Partnerships, Syndicates, Pools, etc. (State name, address, and kind of business) | | | | |
| 6 | Income from Fiduciaries (State name and address) George S. Clifford, Jr., Trust
Dividends on all shares of domestic corporations.
Interest, except tax free
Interest on tax free | | | 890 | 00 |
| 7 | Rents and Royalties (From Schedule B) | | | 300 | 00 |
| 8 | Capital Gain (or Loss) (From Schedule C) | | | 375 | 66 |
| 9 | Taxable Interest on Liberty Bonds, etc. (From Schedule D) | | | | |
| 10 | Dividends on Stocks of: (a) Domestic Corporations subject to taxation under Title I of 1934 Act
(b) Domestic Corporations not subject to taxation under Title I of 1934 Act
(c) Foreign Corporations | | | 11 | 647 00 |
| 11 | Other Income (State nature) (If separate schedule, if necessary) | | | | |
| 12 | Total Income, as Item 1 to 11 | | | | |
| 13 | Interest Paid (Explain in Schedule F) | | | 12 | |
| 14 | Taxes Paid (Explain in Schedule F) | | | 533 | 71 |
| 15 | Losses by Fire, etc. (Explain in Schedule F) | | | | |
| 16 | Bad Debts (Explain in Schedule F) | | | | |
| 17 | Contributions (Explain in Schedule F) | | | | |
| 18 | Other Deductions Authorized by Law (Explain in Schedule F) | | | | |
| 19 | Total Deductions, as Items 13 to 18 | | | 61 | 36 |
| 20 | Net Income (Item 12 minus Item 19) | | | | |

U.S. DEPARTMENT OF TREASURY
DIV. OF TAX APPEALS
RECEIVED
JUN 15 1935
WASHINGTON, D.C.

210 870 33

635 21

20 235 11

COMPUTATION OF TAX See Instruction 23

| | | | | | |
|--|-----------|-----------|--|--------|--------|
| 21. Adjustments (Item 20 above) | | 20 235 12 | 29. Normal tax (4% of Item 28) | | None |
| 22. Less: Personal exemption | | | 30. Refund (See Item 24 - See Instruction 23) | | 238 50 |
| 23. Child Tax Deductions | 400.00 | 400.00 | 31. Total tax (Item 29 plus Item 30) | | 238 50 |
| 24. Balance (Surplus not income) | | 19 835 12 | 32. Less: Income tax paid at source (2% of Item 8) | 5 6.50 | |
| 25. Less: Interest on Liberty Bonds, etc. (Item 9) | | | 33. Balance (See Item 32 and 33) | | 232 90 |
| 26. Dividends (Item 20 (d)) | 19 247 80 | | 34. Total Tax (Item 31 minus Item 32 and 33) | | 232 90 |
| 27. Earned Income Credit (See Instructions 1-12) | 300.00 | 20 147 80 | | | |
| 28. Balance subject to normal tax | | None | | | |

AFFIDAVIT (See Instruction 27)

I declare under penalty of perjury that the return, including its accompanying schedules and statements, if any, has been prepared by me or, to the best of my knowledge and belief, by me or by another person acting under my direct supervision and control, and it is true and correct. I declare under penalty of perjury that the return, including its accompanying schedules and statements, if any, has been prepared by me or, to the best of my knowledge and belief, by me or by another person acting under my direct supervision and control, and it is true and correct.

Approved by: William J. [illegible] 42 Virginia Cliff Road

APPROPRIATE (See Instruction 7)

I am enclosing a return that I have prepared in this return for the purpose of personal information and that the return (including its accompanying schedule and statements) is only a true, correct and complete statement of all the information regarding the income tax liability of the person or persons for whom this return has been prepared. I have not and do not intend to

[illegible][illegible]

PETITIONER'S AND RESPONDENT'S EXHIBIT E-3

SCHEDULE A - INCOME OR LOSS FROM BUSINESS OR PROFESSION (See Instructions 1-6)

| | | | | | | | | | | | | | | | | | | |
|---|----------|--------------------------|--------------------------------|---|--|-------------------------|----------------------------------|---|--|---|---|--|--|--|--|----------------------------|--|---|
| 1. Total receipts from business or profession, state kind of business
(Cost of Goods Sold) | 2. Labor | 3. Material and supplies | 4. Merchandise bought for sale | 5. Other costs (itemize below or on separate sheet) | 6. Plus inventory at beginning of year | 7. Total (Lines 2 to 6) | 8. Less inventory at end of year | 9. Net Cost of Goods Sold (Line 7 minus Line 8) | 10. Other business deductions
(Salaries not included in Labor on Line 2 do not deduct compensation for your services) | 11. Interest on business indebtedness by others | 12. Taxes on business and business property | 13. Losses explain in full at foot of page | 14. Bad debts arising from sales or services | 15. Depreciation on business property (explain in full provided at foot of page) | 16. Rent, repairs, and other expenses (itemize below or on separate sheet) | 17. Total (Lines 10 to 16) | 18. Total Deductions (Line 9 plus Line 17) | 19. Net Profit (or Loss) (Line 1 minus Line 18) (Enter as Item 2) |
|---|----------|--------------------------|--------------------------------|---|--|-------------------------|----------------------------------|---|--|---|---|--|--|--|--|----------------------------|--|---|

Enter "C", or "C or M", on Lines 5 and 8 to indicate whether in business are valued at cost, or cost or market, whichever is lower.

Explanation of deductions claimed on Lines 5 and 16

SCHEDULE B - INCOME FROM RENTS AND ROYALTIES (See Instructions 7)

| Kind of Property | Amount Received | Cost or Basis
at Beginning of Year | Depreciation
or Amortization
(See Instructions 7 and 8) | Gain or Loss | Other Income | Total |
|------------------|-----------------|---------------------------------------|---|--------------|--------------|-------|
| | | | | | | |

Explanation of deductions claimed in Column 6

SCHEDULE C - CAPITAL GAINS AND LOSSES (See Instructions 9)

| Description of Property | Date Acquired | Date Sold or Disposed | Amount Realized | Cost or Basis
on March 1, 1913
or Fair Market Value
on Date Acquired | Cost or Basis
on March 1, 1913
or Fair Market Value
on Date Sold or Disposed | Gain or Loss | Excluded Gain or Loss | Net Gain or Loss |
|--|---------------|-----------------------|-----------------|---|---|--------------|-----------------------|------------------|
| Held 1 year or less | 1-6-34 | 2-4-34 | 2,542.00 | 1,200.00 | 1,342.00 | 1,342.00 | 0 | 1,342.00 |
| Held over 1 year but not over 2 years | 9-23-32 | 1-20-34 | 1,988.00 | 1,116.00 | 872.00 | 872.00 | 0 | 872.00 |
| Held over 2 years but not over 5 years | | | | | | | | |
| Held over 5 years but not over 10 years | | | | | | | | |
| Held over 10 years | | | | | | | | |
| TOTAL GAINS AND LOSSES (Enter net gain or loss as Item 8) (Capital losses are allowable only to the extent of \$2,000 plus capital gains) | | | | | | | | |

1. If reporting sale or exchange of capital assets, attach separate schedule, if necessary, for transactions occurring within each of the 4 periods, and transfer gain and loss for each period to this table.

2. If property must be entered in Column 1 if a loss is incurred in Column 1.

3. If a loss is incurred in Column 1, it should be reported in detail, including name and address of corporation, date of stock, number of shares, capital changes affecting basis (stock dividends, other distributions, etc.).

4. If personal or business relationship, if any, of purchase.

SCHEDULE D - INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OR SECURITIES (See Instructions 10)

| 1. Description of Obligations | 2. Amount Owed | 3. Interest Received or Accrued | 4. Principal Amount Received from Taxation | 5. Amount Owed in Excess of Payment | 6. Interest on Amount Owed in Excess of Payment (Do not enter) |
|--|----------------|---------------------------------|--|-------------------------------------|--|
| (a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions | | | | | |
| (b) Obligations issued under Federal Farm Loan Act, or under such Act as amended | | | | | |
| (c) Liberty 3 1/2% Bonds and other obligations of United States issued on or before September 1, 1917 | | | | | |
| (d) Treasury Notes, Treasury Bills, and Treasury Certificate of Indebtedness | | | | | |
| (e) Liberty 4 1/2% and 4 3/4% Bonds and Treasury Bonds | | | | | |
| (f) Obligations of instrumentalities of the United States (other than obligations to be reported in (a) above) | | | | | |

SCHEDULE E - INCOME FROM DIVIDENDS

Itemize all dividends received during the year, stating amounts and names and addresses of corporations declaring the dividends.

SCHEDULE F - EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 10, 17, AND 18

PETITIONER'S AND RESPONDENT'S

Explanation of deductions claimed in Column 6

SCHEDULE C - CAPITAL GAINS AND LOSSES (See Instruction 8)

| 1. DISPOSITION OF PROPERTY | 2. DATE ACQUIRED | 3. DATE REALIZED | 4. AMOUNT REALIZED | 5. COST OR MARKET VALUE OF PROPERTY AT DATE OF ACQUISITION | 6. COST OR MARKET VALUE OF PROPERTY AT DATE OF DISPOSITION | 7. INFORMATION ALLOWABLE UNDER SECTION 1223 | 8. GAIN OR LOSS | 9. TAX RATE | 10. TAX |
|--|------------------|------------------|--------------------|--|--|---|-----------------|-------------|---------|
| *Held 1 year or less | 2-6-34 | 2-4-35 | 2,500.00 | 2,500.00 | | | 00.00 | 100 | 5.42.00 |
| *Held over 1 year but not over 2 years | 4-22-35 | 2-29-36 | 1,950.00 | 2,116.00 | | | | 80 | |
| *Held over 2 years but not over 5 years | | | | | | | | 60 | |
| *Held over 5 years but not over 10 years | | | | | | | | 40 | |
| *Held over 10 years | | | | | | | | 30 | |

TOTAL GAINS AND LOSSES (Enter net gain or loss as Item 8) (Capital losses are allowable only to the extent of \$2,000 plus capital gains)

8. **Net Gain or Loss** 5.42.00

9. **Net Capital Gain** 5.42.00

10. **Net Capital Loss** 00.00

SCHEDULE D - INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OR SECURITIES (See Instruction 9)

| 1. OBLIGATION OR SECURITY | 2. AMOUNT OWNED | 3. INTEREST RECEIVED | 4. PRINCIPAL AMOUNT RECEIVED | 5. AMOUNT OWNED IN EXCESS OF EXEMPTION | 6. INTEREST ON AMOUNT IN EXCESS OF EXEMPTION |
|--|-----------------|----------------------|------------------------------|--|--|
| (a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions | | | All | | |
| (b) Obligations issued under Federal Farm Loan Act, or under such Act as amended | | | All | | |
| (c) Liberty 3 1/2% Bonds and other obligations of United States issued on or before September 1, 1917 | | | All | | |
| (d) Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness | | | All | | |
| (e) Liberty 4% and 4 1/2% Bonds and Treasury Bonds | | | \$1,000 | | |
| (f) Obligations of instrumentalities of the United States (other than obligations to be reported in (b) above) | | | None | | |

SCHEDULE E - INCOME FROM DIVIDENDS

List all dividends received during the year, stating amounts and names and addresses of corporations declaring the dividends

SCHEDULE F - EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 14, 16, 17, AND 18

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

| 1. Kind of Property (If buildings, state whether or not leased) | 2. Date Acquired | 3. Cost or Market Value at Date Acquired | 4. Amount Fully Depreciated in Year of End of Year | 5. Depreciation Allowed in Prior Years | 6. Remaining Cost or Other Basis at End of Year | 7. Depreciation Allowed in Year | 8. Depreciation Allowed in Prior Years | 9. Remaining Cost or Other Basis at End of Year |
|---|------------------|--|--|--|---|---------------------------------|--|---|
| | | | | | | | | |

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A AND IN ITEM 15

| 1. Kind of Property | 2. Date Acquired | 3. Cost | 4. Depreciation Allowed in Prior Years | 5. Depreciation Allowed in Year | 6. Insurance and Salvage Value | 7. Deductible Loss |
|---------------------|------------------|---------|--|---------------------------------|--------------------------------|--------------------|
| | | | | | | |

PETITIONER'S AND RESPONDENT'S EXHIBIT E-5.

PETITIONER'S AND RESPONDENT'S EXHIBIT E-5

Form 1096
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

INFORMATION RETURN FOR CALENDAR YEAR 1934

INSTRUCTIONS TO PAYORS

Prepare one of these forms for each payee in accordance with the instructions on return Form 1096.

Forward with return Form 1096 to reach the Commissioner of Internal Revenue, Sorting Section, Washington, D. C., on or before February 15, 1935.

WHO PAID **MRS. VIRGINIA R. CLIFFORD**
(Name and address) **C/O CREAM OF WHEAT CORP.
738 STINSON BLVD
MINNEAPOLIS, MINN.**

KIND AND AMOUNT OF INCOME PAID

| SALARIES, WAGES, FEES, COMMISSIONS, ETC.
(If single \$1,000 or more, if married \$2,000 or more) | INTEREST ON NOTES, BONDS, AGES, ETC.
(If single \$1,000 or more, if married \$2,500 or more) | RENTS AND ROYALTIES
(If single \$1,000 or more, if married \$2,500 or more) | DIVIDENDS
(\$100 or more) | FOREIGN ITEMS AND OTHER INCOME
(If single \$1,000 or more, if married \$2,000 or more) |
|---|---|--|------------------------------|---|
| \$ | \$ | \$ | \$ | \$ |
| | | | 11,750.00 | |

Check, if possible:
☐ SINGLE
☐ MARRIED

BY WHOM PAID **Cream of Wheat Corp.**
(Name and address)

12-16491 U. S. GOVERNMENT PRINTING OFFICE 1934

Form 1090
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Revised January, 1929

OWNERSHIP CERTIFICATE

TO BE USED BY A CITIZEN OR RESIDENT INDIVIDUAL, FIDUCIARY, OR PARTNERSHIP
IN CONNECTION WITH INTEREST IN BONDS OF A DOMESTIC OR RESIDENT CORPORATION CONTAINING A TAX-FREE COVENANT

| DEBTOR CORPORATION | OWNER OF BONDS (Name must be legible) |
|--|---------------------------------------|
| NAME Wheat Flouring Co. | NAME Virginia R. Clifford |
| ADDRESS Minneapolis, Minn. | STREET 738 Stinson Blvd. |
| CITY Minneapolis | CITY Minneapolis |
| STATE Minnesota | STATE Minnesota |
| DATE OF BOND 3-1-34 | DATE PAID 3-1-34 |
| I certify that to the best of my knowledge and belief the information entered hereon is correct. | |
| Signature of owner, trustee, or agent Virginia R. Clifford | |
| Address of owner, trustee, or agent 738 Stinson Blvd. Minneapolis, Minn. | |
| A fiduciary must disclose the name of the estate or trust for which he acts. | |

| CLASSES OF BOND OWNERS ACCORDING TO NET INCOME | AMOUNT OF INTEREST RECEIVED |
|--|-----------------------------|
| 1. Individual or fiduciary whose net income does not exceed the personal exemption and other credits | No tax paid by corp. |
| 2. Individual or fiduciary whose net income in excess of the personal exemption and other credits does not exceed \$1,000 | 15% tax paid by corp. |
| 3. Individual or fiduciary whose net income in excess of the personal exemption and other credits exceeds \$1,000 or a partnership | 25% tax paid by corp. |

NOTE: If you discover at the close of the year that the interest was not entered on the proper line above, you should prepare on or before February 1 of the following year an amended certificate on this form and forward it to the corporation which issued the bonds.

Form 1000
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Revised January, 1929

PETITIONER'S

OWNERSHIP

TO BE USED BY A CITIZEN OR RESIDENT
IN CONNECTION WITH INTEREST ON BONDS OF A DOMESTIC OR
DEBTOR CORPORATION

Name

Address

NAME OF BOND

Date interest was due
on the above bond

Date
paid

I certify that to the best of my knowledge and belief the information entered hereon
is correct.

(Signature of owner, trustee, or agent)

(Address of trustee or agent)

(A fiduciary must disclose the name of the estate or trust for which he acts.)

Form 1000
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Revised January, 1929

OWNERSHIP

TO BE USED BY A CITIZEN OR RESIDENT
IN CONNECTION WITH INTEREST ON BONDS OF A DOMESTIC OR
DEBTOR CORPORATION

Name

Address

NAME OF BOND

Date interest was due
on the above bond

Date
paid

I certify that to the best of my knowledge and belief the information entered hereon
is correct.

(Signature of owner, trustee, or agent)

(Address of trustee or agent)

(A fiduciary must disclose the name of the estate or trust for which he acts.)

NOTE.—If you discover at the close of the year that the interest was not entered on the proper line above, you should prepare on or before February 1 of the following year an amended declaration to set out the correct information and attach it to the original.

Before United States Board of Tax Appeals

[Title omitted.]

Stipulation as to facts

Filed at hearing June 20, 1938

It is hereby stipulated by and between George B. Clifford, Jr., the petitioner, and the Commissioner of Internal Revenue, through their respective counsel as follows with respect to testimony and facts in this case:

1

The petitioner in these proceedings is George B. Clifford, Jr. Virginia Clifford, referred to herein, is now and during the year 1934 was the wife of the petitioner. They now reside and in 1934 did reside at 2601 East Lake of Isles Boulevard in the City of Minneapolis, Minnesota.

2

The petitioner on June 20, 1934, executed the Declaration of Trust, a copy of which is hereto attached, marked "Exhibit A" and hereby made a part hereof. Virginia Clifford executed an acknowledgment of notice of the trust on June 20, 1934. This trust is referred to in the statement attached to deficiency notice as "Trust #2."

3

The petitioner filed his individual income-tax return for the year 1934. The petitioner also filed a fiduciary return and a separate tax return for the trust under said Declaration of Trust for the period from June 20, 1934, to December 31, 1934. Virginia Clifford filed her individual income-tax return for the year 1934. All of said returns were filed with the Collector of Internal Revenue at St. Paul, Minnesota.

31

4

The fiduciary return of said trust showed a net income of \$9,764.13; this return showed the capital gain therefrom, or \$1,310.20, as distributed to and chargeable to the trust; and showed the balance of net income therefrom, or \$8,453.93, as distributed to and chargeable to Virginia Clifford. The tax return filed on behalf of the trust included the item of \$1,310.20 and tax upon this amount after deducting personal exemption of \$1,000 was paid by the trust. The net income of the trust from sources other than capital gains were included in the individual return of Virginia Clifford for the year 1934. The petitioner did not include any income of the said trust in his return for the year 1934.

5

The Commissioner on February 15, 1937, mailed to the petitioner notice of deficiency with reference to petitioner's income-tax liability

for the year 1934, a copy of said notice being attached to the petition herein. The notice proposes a deficiency of \$2,909.41. The amount in dispute as alleged in the petition herein is \$2,756.62.

6

The statement attached to notice refers to certain adjustments to which the petitioner does not object in his petition. The nature of these adjustments will appear from the following facts. Reference has already been made in this stipulation to the following returns: (1) George B. Clifford, Jr., individual return; (2) Virginia Clifford individual return; (3) George B. Clifford, Jr., Trust fiduciary return covering period from June 20, 1934, to December 31, 1934, as to trust under Declaration of Trust, dated June 20, 1934; (4) George B. Clifford, Jr., Trust tax return covering period from June 20, 1934, to December 31, 1934, as to the same trust under Declaration of Trust, dated June 20, 1934. This trust as previously stated is referred to in the deficiency notice of February 15, 1937, as "Trust #2."

7

In addition to the foregoing returns, the petitioner, George B. Clifford, Jr., as trustee, filed with Collector of Internal Revenue at St. Paul, Minnesota, in March 1935, a fiduciary return for the period from January 1, 1934, to June 19, 1934, as to the income of a trust created by a Declaration of Trust, dated September 22, 1933. This trust is referred to in the deficiency notice as "Trust #1." This trust was terminated by mutual agreement between George B. Clifford, Jr., as trustee, and Virginia Clifford, as sole beneficiary, on June 20, 1934. The petitioner had included in his individual return as filed the total income and deductions shown by the fiduciary return of said Trust #1. The difference between the income, as shown in said statement, from Trust #1 under "5. Fiduciary" as interest, \$1,311.32, Home Owners Loan Corporation interest, \$114.00, Dividends, \$8,000.00, and Capital gains, \$3,787.20 (being the total sum of \$13,212.52); and the income from said trust included in the petitioner's individual return and shown in said statement as "Trust Income reported, \$13,345.01" results from adjustments in said income by the examining agent, to which adjustments the petitioner has made no objection. It is agreed between the parties hereto that there is no controversy as to amount or allocation of income of this trust.

8

The petitioner objects to the inclusion in his income for the year 1934 of any part of the income of trust under the Declaration of Trust, dated June 20, 1934. No objection is made to the adjustments in income and deductions in the return of said trust. It is agreed between the

34

wish
and

parties hereto that the following statement correctly reflects the income of said trust:

| | |
|----------------------------------|-------------|
| Interest | 480.45 |
| Interest tax free covenant bonds | 500.00 |
| Capital Gain | 1,180.96 |
| Dividends | 8,000.00 |
| Total income | \$10,141.41 |
| Taxes paid | 18 |
| Other deductions | 30.00 |
| Total deductions | 30.18 |
| Net income | \$10,111.23 |

It is agreed between the parties hereto that if called to testify, George B. Clifford, Jr., and Virginia Clifford would testify substantially as hereafter set forth:

That during the year 1934, Virginia Clifford had substantial means of her own. That her stocks, bonds, and other securities during said year had a value in excess of \$150,000. That her income from her own investments was approximately \$12,783.83.

That over a period of many years, commencing in 1924 or prior thereto, down to and including the present year 1938, the petitioner has made transfers of substantial sums in stocks and bonds directly to Mrs. Clifford and their three children. That the petitioner has intended by said gifts to give security and economic independence to his wife and children. That tax effects of such gifts were considered by the petitioner, but that such tax effects were not the sole consideration in making said gifts. That the creation of the trust of June 20, 1934, was part of this general purpose. That petitioner on or about March 15, 1935, filed with the Collector of Internal Revenue at St. Paul, Minnesota, Gift Tax return for the calendar year 1934, and paid gift tax shown to be payable by said return. That said return included the value as of date of gift of said trust of Virginia Clifford.

That the petitioner, George B. Clifford, Jr., has at all times from and after June 20, 1934 held the securities listed in the schedule attached to the said Declaration of Trust, dated June 20, 1934, and the proceeds from any sale thereof and all investments of the said proceeds in trust pursuant to the terms of said Declaration of Trust. That he has, as trustee of said trust, distributed any income therefrom only to Virginia Clifford, as beneficiary thereof, except minor sums disbursed for taxes or expenses of the trust itself.

That there were no additions, restrictions, or supplemental understandings modifying the terms of said Declaration of Trust of June 20, 1934. That Virginia Clifford has at all times been free to use the income of said trust for any purpose she might wish. That there was not at the time of the creation of said trust and there never has been any agreement between the petitioner and

Virginia Clifford as to the use of the income from said trust or in direction or instruction by the petitioner as to the use thereof.

That the petitioner has since the date of said trust maintained separate bank account as Trustee; that he has placed in said account income and cash of said trust. That Virginia Clifford has for many years prior to the date of said trust and continuously to the present maintained a separate personal bank account in her own name; that she is the only person who could or did draw checks on said account at any time during 1934 to the present date. That Virginia Clifford at all times deposited in her said bank account income from her own stocks, bonds, and other securities. That George B. Clifford, Jr. as trustee, has at all times issued checks against the said trust account to Virginia Clifford for the income of said trust, and said checks have at all times been deposited in Virginia Clifford's said personal bank account, larger items of income have been checked out of the trust account in this manner soon after receipt by trustee, small items have been permitted to accumulate for short periods in trustee's account before transfer to Virginia Clifford's personal account. That the income of said trust, when received by Mrs. Clifford, was deposited in and intermingled in the same account with income from all securities owned by Mrs. Clifford. That no record has been kept of the use or expenditure by Mrs. Clifford of the funds so deposited in Mrs. Clifford's personal bank account during the year 1934. That Mrs. Clifford paid from said account the monthly allowance of \$133. to her mother and others gifts to her mother and other relatives, purchases of clothing for herself and her children, personal jewelry, antiques, and other art objects, and personal travel. That she also paid from said account certain so-called household bills or accounts as women servants, cleaning bills, and supplies.

That the petitioner and Mrs. Clifford did not intend or contemplate that the petitioner should be relieved or discharged from the liability for the payment of any household or family expenses by said trust. That the petitioner, after execution of said trust, paid large sums for so-called household or family expenses out of his own personal funds.

That the petitioner has not, subsequent to the creation of said trust withdrawn or used for his own purpose any part of the principal or income of said trust and that he has not exercised any power with respect thereto which is not authorized by the terms of said Declaration of Trust.

Dated this 20th day of June, 1938.

THOMAS P. HELMEY,

STINCHFIELD, MACKALL,

CROUNSE, McNALLY & MOORE,

Attorneys for Petitioner.

J. P. WENCHEL,

Attorney for Commissioner of

Internal Revenue.

Per W. FRANK GIBBS.

Exhibit A to stipulation

DECLARATION OF TRUST

I, George Barnard Clifford, Jr., of Minneapolis, Minnesota, being the owner and holder of all the bonds, debentures, notes, certificates, or other securities referred to in the attached Exhibit A, do hereby acknowledge and declare that I do and will hold all of the same and all my right, title, and interest therein as a trust estate in trust for the uses and purposes and upon the terms and conditions following:

1. All the net income from the trust estate received during the continuance of the trust hereby created and remaining after payment of or due allowance for all expenses of holding, managing, or administering the same, including any taxes that I as trustee thereof may be obliged or may elect to pay, shall be held for the exclusive benefit of Virginia R. Clifford (for convenience hereinafter sometimes referred to as the life beneficiary).

36 2. The trust hereby created shall continue for a term of five (5) years from the date of this Declaration of Trust unless the life beneficiary or myself shall die during said term, and at the expiration of said term or upon the earlier death of the life beneficiary or myself during said term, whichever event shall first occur, the trust hereby created shall forthwith and without any further act or deed terminate.

3. During the continuance of this trust, I, as trustee, may pay and distribute to the life beneficiary, quarterly or at such other times as I may deem convenient during any calendar year, the whole or such part of the net income of said trust as I, as trustee, may in my absolute discretion determine. Upon the termination of the trust, at the expiration of the term of this trust or upon the earlier death of the life beneficiary or myself as provided in paragraph numbered 2. above, any and all accrued or undistributed net income from the trust estate and any proceeds from the investment of such net income in my hands as trustee shall be deemed and treated as property owned absolutely by Virginia R. Clifford as of the time of the termination of the trust, and the remainder of the trust estate, including the entire principal or corpus thereof, shall be deemed and treated as property owned absolutely by me as of the same time.

4. During the continuance of the trust hereby created I shall have full power and authority to do the following things: (a) To exercise, or to appoint proxies to exercise, any and all voting powers under any certificates or shares of stock in the trust estate; (b) to retain, or to sell, exchange, mortgage, or pledge any certificates, shares of stock, securities or other items of property, or any fractional interest in any of the same now or hereafter in the trust estate, whether as part of the corpus or principal thereof or as investments or proceeds and any income therefrom, upon such terms and for such consideration as I in my absolute discretion may deem fitting; (c) to invest any cash or money in the trust estate or any income therefrom

same in any bank, trust company or other similar institution, or by purchasing secured or unsecured notes or certificates of deposit, or by purchasing any bonds, stocks, securities, or other personal property of any description, without restriction because of the speculative character of the investment or the rate of return therefrom or any laws pertaining to the investment of trust funds; (d) to collect, receive, and hold all dividends, interest, increment, and income belonging or due to the trust estate; (e) to compromise, settle, or adjust or release any claims which I may hold as trustee; (f) to hold any securities or items of property or any fractional interest therein, which may be in the trust estate, in the names of other persons or in my own name as an individual except as in this agreement otherwise provided.

5. Extraordinary cash dividends, any dividends paid in stock, or the proceeds received from sale of any subscription rights not exercised, or any enhancement, realized or not, in the value of securities shall be considered and treated as principal and not income. All premiums on investments shall be charged and all discounts on investments shall be credited against or to principal as the case may be.

6. I shall not individually or as trustee be liable or responsible to the life beneficiary for any loss of any kind except in consequence of my own wilful and deliberate violation of my duties as trustee herein particularly specified.

7. Except as otherwise herein provided specifically to the contrary, no title in or to the trust estate or any income therefrom shall vest in the life beneficiary, and neither the principal nor any future or accrued or undistributed income shall be liable or in any manner chargeable for the debts of the life beneficiary, and the life beneficiary shall have no power to sell, transfer, encumber, or in any manner anticipate or dispose of any interest in the trust estate or any income therefrom prior to actual payment or delivery thereof to the life beneficiary.

In Witness Whereof I have hereto set my hand this 20 day of June 1934.

GEO. B. CLIFFORD, JR.

Signed in the Presence of;

GEO. E. GARLOUGH.

GRACE J. MOE.

38 STATE OF MINNESOTA.

County of Hennepin, ss:

On this 20 day of June 1934, before me, a notary public within and for said County, personally appeared George Barnard Clifford, Jr., to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

[NOTARIAL SEAL]

J. V. HEGERLE.

Notary Public, Hennepin County, Minn.

My Commission Expires Jan. 8th, 1939.

Virginia R. Clifford, the beneficiary named in the foregoing instrument, hereby acknowledge notice of the execution thereof and of a true copy thereof.
 dated June 20, 1934:

VIRGINIA R. CLIFFORD.

Exhibit A to declaration of trust

| Security | Rate | Maturity | Par value |
|---|------|----------|------------|
| Telephone Co. of Canada, 1st Mtge | 5 | 1957 | \$5,000.00 |
| Atlantic Railway, 1st Mtge | 4 | 1955 | \$1,000 |
| on & Manhattan, 1 Lien & Ref | 5 | 1957 | \$5,000.00 |
| as City Southern, 1st Mtge | 3 | 1950 | 5,000.00 |
| Virginia & Pittsburgh, 1st Mtge | 4 | 1950 | 5,000.00 |
| ern Maryland, 1st Mtge | 4 | 1952 | 5,000.00 |
| ewa Power Co., 1st Mtge | 6 | 1947 | 5,000.00 |
| nal Steel Corp., 1st Coll S. F. | 6 | 1956 | 5,000.00 |
| American Car Corp., Eq. Tr | 5 | 1942 | 5,000.00 |
| Diego Water Supply Co. | 5 | 1955 | 2,000.00 |
| gfield Gas & Electric Co. | 5 | 1957 | 2,000.00 |
| Western Natl. Bank—Checking Account | | | 1,285.79 |
| n of Wheat Corporation: | | | |
| Trustees Voting Trust Certificates (8), Common Stock shares | | | 8,000 |
| Subject to the following indebtedness— | | | |
| ge Barnard Clifford, Jr. | | | \$52.50 |
| nia R. Clifford | | | 4,186.00 |

of the foregoing securities were set aside pursuant to the foregoing Declaration of Trust on the date of the execution thereof, a list of securities by error not having been attached. This list of securities was attached hereto as of June 20, 1934, this 11 day of February 1935.

VIRGINIA CLIFFORD.
 BARNARD CLIFFORD.

Before United States Board of Tax Appeals

Præcipe for transcript

Filed January 16, 1939

the Clerk of the United States Board of Tax Appeals:

You are requested by the Petitioner in the above-entitled cause to make a transcript of record therein to be filed in the United States Circuit Court of Appeals for the Eighth Circuit, pursuant to review in said cause, and to include in such transcript of record copy duly certified as correct, of the following documents:

Docket entries of proceedings before the Board.

Pleadings before the Board, as follows:

1) Petition with Exhibits attached thereto.

2) Answer of the Respondent.

Memorandum Opinion of the Board promulgated September 26, including findings of facts therein.

4. Decision entered September 27, 1938.
5. Motion for Review by Full Board and, if that be not Granted, for Reconsideration.
6. Order Denying Review by the Full Board and Reconsideration entered October 25, 1938.
7. Petition for Review with Notice of Filing, and Proof of Service of Notice and copy of Petition.
8. Statement of Evidence, including stipulation as to facts, and Exhibits A-1, B-2, C-3, D-4, and E-5, as settled and allowed.
9. This Praecept.

The foregoing to be prepared, certified, and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Eighth Circuit.

THOMAS P. HELMEY,
Attorney for Petitioner,
1140 First National-Soo Line Building,
Minneapolis, Minnesota.

- 68 Received a copy of the foregoing Praecept, which is hereby agreed to this 16th day of January 1939.

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue,
Attorney for Respondent.

[Clerk's certificate to foregoing transcript omitted in printing.]

- 69 [Appearances of counsel omitted in printing.]

- 71 In United States Circuit Court of Appeals, Eighth Circuit

Order of submission

May 23, 1939

This cause having been called for hearing in its regular order, argument was commenced by Mr. Thomas P. Helmey for petitioner, continued by Mr. S. Dee Hanson, Special Assistant to the Attorney General, for respondent, and concluded by Mr. Frederick H. Stinchfield for petitioner.

Thereupon, this cause was submitted to the Court on the transcript of the record from said Board of Tax Appeals and the briefs of counsel filed herein.

In United States Circuit Court of Appeals, Eighth
Circuit

No. 11431—May Term, A. D. 1939

GEORGE B. CLIFFORD, JR., PETITIONER

vs.

T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition To Review Decision of United States Board of Tax
AppealsGARDNER and THOMAS, Circuit Judges, and WYMAN, District
JudgeMr. Thomas P. Helmeý and Mr. F. H. Stinchfield (Messrs. Stinch-
Mackall, Crounse, McNally & Moore and Mr. William W. Wat-
were with them on the brief) for petitioner.Mr. S. Dee Hanson, Special Assistant to the Attorney General (Mr.
all Key, Special Assistant to the Attorney General, and Mr. Mac
ll, Special Assistant to the Attorney General, were on the brief)
respondent.*Opinion*

July 19, 1939

GARDNER, Circuit Judge, delivered the opinion of the court:

This is a petition to review a decision of the Board of Tax Ap-
peals which sustained a redetermination by the Commissioner of in-
dividual income tax liability of petitioner, George B. Clifford, Jr.,
for 1934. The facts were stipulated, and, hence, are not in
dispute. So far as here material, they are substantially as
follows:On June 20, 1934, petitioner executed a declaration of trust by
which he acknowledged that he held certain securities as a trust-
ee, in trust for the uses and purposes and upon the terms and
conditions set out in the trust instrument; that all the net income
derived from the estate during the continuance of the trust so de-
termined, after payment of all necessary expenses of holding, managing,
administering the estate, including taxes that the trustee might be
legally required to pay, should be held for the exclusive benefit of Virginia R.
Clifford, petitioner's wife, for a period of five years from the date

of the declaration of trust, unless the beneficiary or the settlor should die during that term. At the expiration of the term, or upon the earlier death of the beneficiary or the settlor, the trust should terminate; that the settlor as trustee might pay and distribute to the beneficiary quarterly, or at such other times as he might deem convenient during any calendar year, the whole or any part of the net income as he might in his discretion determine. At the termination of the trust, any and all accrued or undistributed net income, and any proceeds from the investment of such net income, should be deemed and treated as property owned absolutely by Virginia R. Clifford, the beneficiary, as of the time of the termination of the trust, and the remainder of the trust estate should be deemed and treated as property owned by the settlor; that the trustee should have full power and authority to do the following things: "(a) To exercise, or to appoint proxies to exercise, any and all voting powers under any certificates or shares of stock in the trust estate; (b) to retain, or to sell, exchange, mortgage, or pledge any certificates, shares of stock, securities, or other items of property or any fractional interest in any of the same now or hereafter in the trust estate, whether as part of the corpus or principal thereof or as investments or proceeds and any income therefrom, upon such terms and for such consideration as I in my absolute discretion may deem fitting; (c) to invest any cash or money in the trust estate or any income therefrom by lending the same with or without security or by depositing the same in any bank, trust company, or other similar institution, or by purchasing secured or unsecured notes or certificates of deposit or by purchasing any bonds, stocks, securities, or other personal property of any description, without restriction because of the speculative character of the investment or the rate of return therefrom or any laws pertaining to the investment of trust funds; (d) to collect, receive, and hold all dividends, interest, increment, and income belonging or due to the trust estate; (e) to compromise, settle, or adjust or release any claims which I may hold as trustee; (f) to hold any securities or items of property or any fractional interest therein, which may be in the trust estate, in the names of other persons or in my own name as an individual except as in this agreement otherwise provided."

74 Since June 20, 1934, the date of the declaration of trust, petitioner has maintained a separate bank account as trustee, in which he has placed income and cash of the trust. He has, as trustee, issued checks against the trust account to his wife, which have been deposited in the personal bank account of his wife, Virginia R. Clifford. The income of the trust, when received by Mrs. Clifford, was deposited in and intermingled in the same account with income from other securities owned by her, and no separate record was kept by her of the use of the trust income. Since June 20, 1934, petitioner has not withdrawn nor used for his own property any part of the principal or income of the trust, but all of the net income received by him, amount-

ing to \$8,453.93, has been distributed to the beneficiary, Virginia R. Clifford, and was included in the income tax returns filed by her for the year. The petitioner filed his income tax return for the year 1934, but did not include any return from the trust. The Commissioner increased the petitioner's taxable income for the year 1934 by the amount of \$10,111.23 the gross income of the trust, and upon review the Board of Tax Appeals affirmed the action of the Commissioner.

Respondent admits that in form at least, a trust was created, but contends that for tax purposes the trust should be denied effect because (1) the petitioner possessed the "rights of possession, control, and ultimate enjoyment;" (2) the trust instrument was but an assignment of future income from property retained by petitioner; and (3) the income was taxable under Section 100 of the 1934 Revenue Act.

That an owner of property may declare himself trustee of his property is now well settled. *St. Louis Union Trust Co. v. Becker*, (CCA8) 73 F. (2d) 851; *Becker v. St. Louis Union Trust Co.*, 296 U. S. 48; *Morsman v. Commissioner*, 90 F. (2d) 18. Thus, in *Becker v. St. Louis Union Trust Company*, supra, the court

aid:
"By the declaration of trust here under review, the legal title, possession, and control of the trust estate passed irrevocably from the grantor as an individual to himself as trustee. The effect is no different than if the trustee had been another person."

It is, however, contended by respondent that the trust instrument retained or conferred upon the petitioner as trustee such rights of possession, control, and ultimate enjoyment as to render the trust invalid. We have already set forth the provision in the trust instrument which granted petitioner specific powers with reference to the trust estate, but we think these provisions are not broader than those retained by us in *St. Louis Union Trust Company v. Becker*, supra, which was affirmed by the Supreme Court in *Becker v. St. Louis Union Trust Company*, supra. In that case the settlor declared himself trustee of certain securities for the benefit of a third party and gave the trustee power to sell trust property and to exchange shares of stock and securities in the trust estate upon such terms and for such consideration as the trustee in his absolute discretion might deem fitting. In that case, as in the instant case, the income from the trust property was no longer that of the settlor. That was irrevocably signed. In the instant case the trust is limited in time, and at the end of five years the corpus of the estate reverts to the petitioner.

In *Willcuts v. Douglas* (CCA8), 73 F. (2d) 130, the Commissioner contended that the trust was invalid and that the settlor was taxable for the income arising therefrom because by its terms the trust estate was to revert to the creator. In answer to this contention, in an opinion by Judge Stone, we said:

"One contention of the Commissioner is that the entire income from this trust is taxable to the creator thereof because, under its terms, the trust estate is to revert to the creator after it has served

the purpose of its creation and also the creator is entitled to the surplus annual income of the trust above the required payments to the wife. We do not see why either or both of these provisions should, of themselves, have such result; however, they may bear upon the main contention in this appeal, hereafter to be examined.

"The bald fact that, after an irrevocable trust has served its purpose, the trust estate is to revert to the creator, does not, without more, make the income during the trust period that of the creator for tax or any purposes. The statute is aimed at taxation of income."

Trusts created for a definite period of years are valid though at the time specified the trust ceases and the powers and office of the trustee terminate. If the beneficiary under the terms of the trust receives the income, he must pay the tax thereon. *Blair v. Commissioner*, 300 U. S. 5. Here the trust vested absolutely in the beneficiary the income for a period of five years. This was an irrevocable provision of the trust. True, the trustee was given a discretion as to time and amount of payment; but if any of the income remained in his possession at the end of the five-year period, when the trust by its terms terminated, it was to go to the beneficiary absolutely. Where, in contemplation of law, the income remains in substance that of the grantor, the trust is, of course, ineffectual. *Douglas v. Willcuts*, 296 U. S. 1.

While the powers vested in the trustee with reference to the sale and investment of property are broad, they do not, we think, defeat the trust. Express power to sell all or any part of the trust property, to invest and reinvest the proceeds by purchase, exchange or loans, are commonplace in the field of trusts. *Bogert, Trusts and Trustees*, Secs. 611 and 741. Trustees may be given express power to borrow and for that purpose to hypothecate a trust estate. *Bogert*, Sec. 751. The powers with reference to the management and investment of the trust estate are not, we think, such as to extinguish the trust or will or otherwise defeat it. *St. Louis Union Trust Co. v. Becker*, supra; *Corliss v. Bowers*, 281 U. S. 376; *Commissioner v. Waterbury* (CCA2), 97 F. (2d) 383.

The rule announced in *Lucas v. Earl*, 281 U. S. 111, and *Burnet v. Leininger*, 285 U. S. 136, to the effect that the actual earner or recipient of income cannot by assignment avoid the statutory liability is not pertinent, because as owner of the beneficial interest, the beneficiary here is entitled to the income therefrom and is in turn taxed on that income by the statute. As said in *Blair v. Commissioner*, supra.

"These cases are not in point. The tax here is not upon earnings which are taxed to the one who earns them. Nor is it a case of income attributable to a taxpayer by reason of the application of the income to the discharge of his obligation. * * * There is here no question of evasion or of giving effect to statutory provisions designed to forestall evasion; or of the taxpayer's retention of control. * * * In the instant case, the tax is upon income as to which, in the general application of the revenue acts, the tax liability attaches to ownership."

Reserving power of control over the trust property does not invest the trustor with control over economic benefits, and this distinction must be recognized. *Commissioner v. Waterbury*, supra. It is conceded by respondent that such control over the corpus and income are given to petitioner as trustee as to make him in effect the absolute owner. The control of the corpus was vested in the grantor as trustee and not as an individual. Distributions of income to the beneficiary are in the discretion of the trustee to be made quarterly or at such other times as the trustee should determine; but upon termination of the trust, as we have already observed, all income was to be deemed and treated as property owned absolutely by the beneficiary and the corpus of the trust was to be deemed and treated as property owned by the grantor. It is clear that the income belonged to the beneficiary regardless of the time of actual payment to her. If not paid to her during the five-year period, any part remaining was nevertheless her absolute property. In this respect the grantor definitely fixed the time of payment and put the question of ownership of income beyond doubt and likewise beyond his control. It was not to accumulate capital.

Was the petitioner taxable on the income of the trust because of Section 166 of the Revenue Act of 1934? This provision reads as follows:

"Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—

- (1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or
- (2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, then the income of such part of the trust shall be included in computing the income of the grantor."

This question was not passed upon by the Board of Tax Appeals, but it may nevertheless properly be urged here. *Helvering v. Gowran*, 302 U. S. 238; *Helvering v. Rankin*, 295 U. S. 123; *Dickey v. Burnet* (CCA2), 56 F. (2d) 917.

Prior to 1934, the law provided for taxation of trust income to the grantor where he reserved power to revoke the trust at any time during the taxable year. Revenue Act of 1932; Revenue Act of 1928, Sec. 219; Revenue Act of 1926, Sec. 219 (g). The construction placed upon these provisions was that they placed upon the grantor of the trust a liability to taxation on trust income only when revocation might be accomplished during the taxable year. If the trust could not be revoked within the year, the statute did not apply and the income was taxable to the trust grantor. *Langley v. Commissioner* (CCA2), 56 F. (2d) 796; *Commissioner v. Grosvenor* (CCA2), 85 F. (2d) 2; *White v. White* (D. C.), 56 F. (2d) 390. In Section 166 of the 1934 Act, the words relating to revocation during the taxable year were omitted.

The grantor in the instant case was given no power of revocation or reversion. The trust was absolute for the period of five years, except that it might terminate sooner by events beyond the control of the petitioner. Generally, a power of revocation is the reservation of a power in the grantor to put an end to the estate granted. *Tiffany, Real Property*, 2nd Ed. p. 1049. In this Section 166, the word "revest," clearly means the power reserved to the grantor to terminate a granted estate. *United States v. First Natl. Bank of Birmingham (CCA5)*, 74 F. (2d) 360. An existing right in property is not a power, but power is the right, ability or faculty of doing something. *Bouvier's Law Dictionary*, p. 2646. Here, manifestly, petitioner had no power to divest nor abridge the existing estate, and hence, the trust income is not affected by Section 166, supra.

It is urged that administrative construction has been reinforced by subsequent legislation. Treasury Regulations adopted under the 1934 Act prescribed rules for determining whether income of a trust was taxable to the grantor, and in doing so gave as an example a trust for three years, at the end of which time it might be extended for a like period at the option of the grantor and successively thereafter, but in the absence of such an extension the title is once more to revert to the grantor in possession and enjoyment. (Treas. Regulations 79 86, Art. 166-1.) Subsequent to the adoption of the regulation, the Revenue Acts of 1936 and 1938 reenacted Section 166 without change.

We think there is no basis for the contention of legislative approval. The regulation is in direct conflict with the plain language and the meaning of the statute. A plainly erroneous departmental construction does not become correct by any subsequent reenactment of the provision of the statute to which it pertains. *United States v. Missouri Pacific Railroad Co.*, 278 U.S. 269. Neither does it appear that there is uniformity in the construction. In 1934, a subcommittee of the House Ways and Means Committee made a report on the proposed revenue bill and suggested certain recommendations. (C. C. H. Standard Tax Service, 1934, III pp. 6673, 6697, 6707.) Among them was the following:

"(6) The income from short-term trusts and trusts which are revocable by the creator at the expiration of a short period after notice by him should be made taxable to the creator of the trust."

In the 1934 Revenue Bill, however, the House made no change in Section 166 as it appeared in the Revenue Act of 1932. The Senate amendment omitted the provision with reference to notice. The Conference Committee adopted the Senate amendment. Where construction is not uniform, it cannot be given effect. *United States v. Missouri Pacific Railroad Co.*, supra; *Iselin v. United States*, 270 U.S. 245. It appears that the Treasury Department not only considered legislation as necessary to tax the income of a trust for a term of years, but it likewise appears that Congress refused to adopt the suggestion. Respondent's contention that the provision for termination of the

state by passage of time or death was a power to revert to petitioner, not sustained by reason or authority, and we cannot so hold.

The decision of the Board of Tax Appeals is therefore reversed and the cause is remanded to the Board of Tax Appeals for further proceedings consistent herewith.

In United States Circuit Court of Appeals, Eighth Circuit

No. 11431

GEORGE B. CLIFFORD, JR., PETITIONER

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

Decree

July 24, 1939

On Petition to Review Decision of United States Board of Tax Appeals

This cause came on to be heard on the petition to review a decision of the United States Board of Tax Appeals which sustained a determination by the Commissioner of individual income tax liability of the petitioner, George B. Clifford, Jr., for the year 1934, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court that the decision of the said Board of Tax Appeals in this cause be, and the same is hereby, reversed without the taxation of costs to either party in this Court.

And it is further ordered by this Court that this cause be, and the same is hereby, remanded to the said Board of Tax Appeals for further proceedings consistent with the opinion of this Court filed herein

July 19, 1939.

[Clerk's certificate to foregoing transcript omitted in printing.]

Supreme Court of the United States

Order allowing certiorari

Filed November 6, 1939


The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision of this application.

[Endorsement on cover:] File No. 43790. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 383. Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, vs. George B. Clifford, Jr. Petition for a Writ of Certiorari and Exhibit Thereto. Filed September 13, 1939. Term No. 383 O. T. 1939.

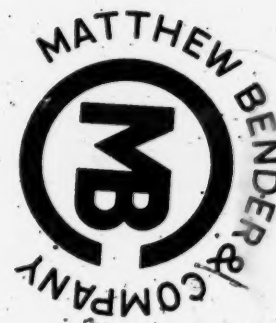
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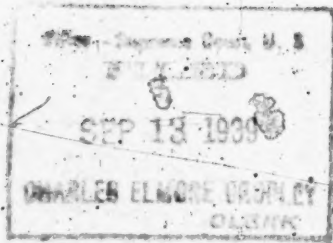
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No. 383

In the Supreme Court of the United States

OCTOBER TERM, 1939

**GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER**

v.

GEORGE B. CLIFFORD, JR.

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH
CIRCUIT**

INDEX

| | Page |
|--|------|
| Opinions below..... | 1 |
| Question presented..... | 2 |
| Jurisdiction..... | 2 |
| Statute and regulations involved..... | 2 |
| Statement..... | 2 |
| Specification of errors to be urged..... | 4 |
| Reasons for granting the writ..... | 4 |
| Conclusion..... | 10 |
| Appendix..... | 11 |

CITATIONS

Cases:

| | |
|---|------|
| <i>Balkwill v. Commissioner</i> , 77 F. (2d) 569, certiorari denied,
296 U. S. 609..... | 10 |
| <i>Bing v. Bowers</i> , 22 F. (2d) 450, affirmed, 26 F. (2d) 1017..... | 9 |
| <i>Blair v. Commissioner</i> , 300 U. S. 5..... | 8 |
| <i>Burnet v. Leininger</i> , 285 U. S. 136..... | 9 |
| <i>Burnet v. Wells</i> , 289 U. S. 670..... | 8 |
| <i>Corliss v. Bowers</i> , 281 U. S. 376..... | 5 |
| <i>Douglas v. Willcuts</i> , 296 U. S. 1..... | 10 |
| <i>DuPont v. Commissioner</i> , 289 U. S. 685..... | 7, 8 |
| <i>Harris v. Commissioner</i> , 39 F. (2d) 546..... | 9 |
| <i>Langley v. Commissioner</i> , 61 F. (2d) 796..... | 5 |
| <i>Lewis v. White</i> , 56 F. (2d) 390, appeal dismissed, 61 F. (2d)
1046..... | 5 |
| <i>Lucas v. Earl</i> , 281 U. S. 111..... | 9 |
| <i>Reinecke v. Smith</i> , 289 U. S. 172..... | 5 |
| <i>Rosenwald v. Commissioner</i> , 33 F. (2d) 423, certiorari de-
nied, 280 U. S. 599..... | 9 |
| <i>Rossmore v. Commissioner</i> , 76 F. (2d) 520..... | 9 |
| <i>Taft v. Commissioner</i> , 304 U. S. 351..... | 7 |
| <i>Ward v. Commissioner</i> , 58 F. (2d) 757..... | 9 |

Statutes:

| | |
|---|----|
| Revenue Act of 1924, c. 234, 43 Stat. 253, Sec. 219..... | 5 |
| Revenue Act of 1934, c. 277, 48 Stat. 680: | |
| Sec. 12 (U. S. C., Title 26, Sec. 22)..... | 11 |
| Sec. 166 (U. S. C., Title 26, Sec. 166)..... | 11 |
| Sec. 167 (U. S. C., Title 26, Sec. 167)..... | 12 |
| Revenue Act of 1935, c. 829, 49 Stat. 1014..... | 7 |
| Revenue Act of 1936, c. 690, 49 Stat. 1648: | |
| Sec. 166 (U. S. C. Supp. IV, Title 26, Sec. 166)..... | 7 |
| Revenue Act of 1937, c. 815, 50 Stat. 813..... | 7 |
| Revenue Act of 1938, c. 289, 52 Stat. 447: | |
| Sec. 166 (U. S. C., Supp. IV, Title 26, Sec. 166)..... | 7 |
| Revenue Act of 1939, Public, No. 155, 76th Cong., 1st Sess..... | 7 |

II

Miscellaneous:

| | |
|--|----|
| H. Rep. No. 1385, 73d Cong., 2d Sess., p. 24 | 6 |
| Treasury Regulations 86, Art. 166-1 | 12 |
| Treasury Regulations 101, Art. 166-1 | 7 |

In the Supreme Court of the United States

OCTOBER TERM, 1939

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER

v.

GEORGE B. CLIFFORD, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certioram issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit, entered in the above entitled cause on July 24, 1939, reversing the decision of the Board of Tax Appeals.

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 10-17) is unreported. The opinion of the Circuit Court of Appeals (R. 70) has not yet been reported.

(1)

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 24, 1939 (R. 76). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The taxpayer in 1934 declared himself trustee of certain property to pay the net income therefrom to his wife or to hold or accumulate it in his discretion, the trust to terminate at the expiration of five years or upon the earlier death of taxpayer or his wife, whereupon the corpus was to be restored to the grantor or his estate but any undistributed net income was to be treated as the property of the wife. Was the net income of the trust for 1934 properly included in the taxpayer's gross income?

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved will be found in the Appendix, *infra*, pp. 11-17.

STATEMENT

The material facts as found by the Board of Tax Appeals (R. 10-16) and stipulated by the parties (R. 30-38) may be summarized as follows:

On June 20, 1934, the respondent declared himself trustee of certain securities (R. 10). The trust was to terminate upon the expiration of five years or upon the earlier death of himself or his wife. Upon termination the corpus was to

"be deemed and treated as property owned absolutely by" the grantor (R. 11).

During the continuance of the trust the grantor, as trustee, retained the right to distribute to his wife, Virginia R. Clifford, the whole or such part of the net income¹ of the trust as he in his absolute discretion should determine. But any accrued or undistributed income remaining upon termination of the trust was to be treated as property owned absolutely by his wife (R. 11).

The grantor retained plenary control over the corpus of the trust, such as the power to sell, exchange, mortgage, or pledge any of the property upon terms and conditions subject only to his absolute discretion, to appoint proxies to exercise voting rights, to make investments without limitation of any laws pertaining to the investment of trust funds, and to settle any claims (R. 11-12). He exonerated himself from any liability as trustee except for "wilful and deliberate" misconduct (R. 12). And, except as provided above, no title in or to the trust estate or any income therefrom was to ~~vest in~~ his wife; neither the principal nor any undistributed income was to be chargeable for her debts; and she was to have no power to encumber

¹ However, the trust instrument provided that (R. 12):

"5. Extraordinary cash dividends, any dividends paid in stock or the proceeds received from sale of any subscription rights not exercised, or any enhancement, realized or not, in the value of securities shall be considered and treated as principal and not income."

or to dispose of any rights or income prior to actual payment to her (R. 12-13).

The net income of the trust for the year 1934 was \$10,111.23 which included \$1,160.96 capital gain (R. 16). The grantor did not report any of the trust income in his own returns (R. 15). The Commissioner determined a deficiency by adding the trust income to the taxpayer's personal income. The Board of Tax Appeals approved, but the Circuit Court of Appeals reversed.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that the trust income here involved was not taxable to the respondent under Section 166 of the Revenue Act of 1934:

(. In holding invalid Article 166-1 of Treasury Regulations 86 as applied to the facts herein.

(3) In holding that the income involved was not taxable to the respondent under Section 22 (a) of the Revenue Act of 1934.

(4) In reversing the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

1. This case presents an important question of federal income taxation, in which the court below not only nullified an attempt by Congress to correct a loophole existing under earlier statutes, but also invalidated the applicable Treasury Regulations.

Experience had shown that a device frequently employed by taxpayers attempting to avoid surtaxes was to create trusts providing for the distribution of income in a predetermined manner satisfactory to the grantor and in which the grantor retained rights in or varying degrees of control over the corpus. To meet this situation, Congress in 1924 provided that where the grantor "has, at any time during the taxable year, * * * the power to revest in himself title to any part of the corpus, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor." Section 219 (g) of the Revenue Act of 1924.²

Taxpayers immediately attempted to circumvent these and successor provisions by creating trusts which were to terminate beyond the taxable year or in which the power to revoke could be exercised only upon notice given more than a year in advance. And relying upon the phrase "during the taxable year," the courts held that the income from such trusts was not taxable to the grantor. *Langley v. Commissioner*, 61 F. (2d) 796 (C. C. A. 2d), Judge A. N. Hand dissenting; *Lewis v. White*, 56 F. (2d) 390 (Mass.), appeal dismissed, 61 F. (2d) 1046 (C. C. A. 1st).

In response to that interpretation of the statute, Congress amended the revenue law in 1934 by elim-

² C. 234, 43 Stat. 253. These provisions were applied and sustained in *Corliss v. Bowers*, 281 U. S. 376, and *Reinecke v. Smith*, 289 U. S. 172.

inating the words "during the taxable year" and "for such taxable year." Revenue Act of 1934, Section 166, *infra*. As thus amended, the Act provided for the taxing of such income to the grantor where he *at any time* was entitled to revest the corpus in himself.³

Article 166-1 of Regulations 86, issued under the Revenue Act of 1934, thereupon made it clear that the grantor is taxable where the trust is no more than an arrangement whereby he entrusts to a fiduciary the title to and management of his property for a fixed period to distribute the income in the way in which he chooses to commit himself in advance, while the corpus is to be held intact for return in due course to himself. "In such a case, it is immaterial that, at the time of the creation of the trust, an irrevocable disposi-

³ In explaining this change in the law, the Conference Report relating to the bill which became the Revenue Act of 1934 stated (H. Rep. No. 1385, 73d Cong., 2d Sess., p. 24):

"Amendments nos. 96 and 97: Under existing law, the income from a revocable trust is taxable to the grantor only where such grantor (or a person not having a substantial adverse interest in the trust) has the power within the taxable year to revest in the grantor title to any part of the corpus of the trust. Under the terms of some trusts, the power to revoke cannot be exercised within the taxable year, except upon advance notice delivered to the trustee during the preceding taxable year. If this notice is not given within the preceding taxable year, the courts have held that the grantor is not required under existing law to include the trust income for the taxable year in his return. The Senate amendments require the income from trusts of this type to be reported by the grantor. The House recedes."

tion or consummated gift was made of those property rights which consist of the right to the expected future income of the corpus for a specified period." Article 166-1, Regulations 86, *infra*.

Substantially the same provisions appeared thereafter in Article 166-1 of Regulations 94 and 101 promulgated under the Revenue Acts of 1936 and 1938, respectively,⁴ which reenacted the relevant statutory provisions without change.⁵ Under the familiar rule these regulations should be treated as having received legislative sanction. *Taft v. Commissioner*, 304 U. S. 351, 357.

The trust in the instant case was limited to a duration of five years, at the expiration of which the corpus was to "be deemed and treated as property owned absolutely by" the taxpayer (R. 11). The grantor's rights were no less than he would have had by creating a trust to last for a longer period but reserving a complete right of revocation at the end of five years.⁶ In either event, the

⁴ C. 690, 49 Stat. 1648; c. 289, 52 Stat. 447.

⁵ Moreover, Congress also enacted, without making any change in these provisions, the Revenue Acts of 1935, 1937, and 1939. C. 829, 49 Stat. 1014; c. 815, 50 Stat. 813; Public, No. 155, 76th Cong., 1st Sess.

⁶ Compare *Du Pont v. Commissioner*, 289 U. S. 685, where irrevocable trusts to pay premiums on policies of insurance on the grantor's life were to last for a period of three years, at the end of which they might be extended for a similar period. In holding valid the provisions of the statute which required the grantor to account for the income of the trusts, the Court said (pp. 688-689):

"* * * Here the grantor did not divest himself of title in any permanent or definitive way, did not strip himself

statute requires the income to be taxed to the grantor and the holding of the court below to the contrary plainly invalidates the Treasury regulations which so construe the statute.

While there is no conflict of decisions among the Circuit Courts of Appeals on this issue, the question is nevertheless one of great importance because the decision below nullifies the applicable Treasury Regulations and throws into confusion the administration of the tax laws in this regard. We are informed by the Treasury Department that there are now pending at least forty-three cases presenting the same issue, involving an aggregate tax liability of approximately \$1,300,000.

2. An additional ground for the imposition of the tax, wholly apart from the trust provisions in Sec-

of every interest in the subject matter of the trust estate. During a term of three years, the trustee was to apply the income to the preservation of the policies, and while thus applying the income was to hold the principal intact for return to the grantor unless instructed to retain it longer. The situation in its legal effect would not be greatly different if the trusts had been created for a month or from day to day. * * *

It is particularly noteworthy that the four Justices who dissented in the companion case of *Burnet v. Wells*, 289 U. S. 670, where a similar trust was to last throughout the life of the grantor, concurred in result in the *Du Pont* case because of the short-term character of the trusts.

Blair v. Commissioner, 300 U. S. 5, heavily relied upon both by the taxpayer and the court below did not involve the application of Section 166 or the regulations promulgated thereunder. Moreover, the assignor of the income in that case was never the owner of the underlying property which produced it.

tion 166, is that the instant case falls within the decisions holding that an assignment of future income either from earnings or from property owned by the assignor does not relieve him of liability for tax. This case presents a substantial conflict in principle with those decisions. *Lucas v. Earl*, 281 U. S. 111 (earnings from services); *Burnet v. Leininger*, 285 U. S. 136 (partnership profits); *Harris v. Commissioner*, 39 F. (2d) 546 (C. C. A. 2d) (partnership profits); *Rossmore v. Commissioner*, 76 F. (2d) 520 (C. C. A. 2d) (partnership profits); *Ward v. Commissioner*, 58 F. (2d) 757 (C. C. A. 9th) (rents); *Rosenwald v. Commissioner*, 33 F. (2d) 423, 426 (C. C. A. 7th), certiorari denied, 280 U. S. 599 (rents); *Bing v. Bowers*, 22 F. (2d) 450, 454 (S. D. N. Y.), affirmed 26 F. (2d) 1017 (C. C. A. 2d) (income from property). The significant factor in the foregoing cases of assignments of income from property or property rights is that since the assignor failed to dispose of the underlying property or property rights which produced the income, he could not by anticipatory arrangements deflect such income for tax purposes.

The instant case presents substantially the same issue. The taxpayer merely relinquished in advance the income from his property for a period of five years, without in any way parting with the principal. True, he accomplished this by means of a trust. But, in its essentials, the mechanism adopted did not differ from a simple assignment of

income for a fixed period. And in *Balkwill v. Commissioner*, 77 F. (2d) 569 (C. C. A. 6th), certiorari denied, 296 U. S. 609, it was held that even though the assignment is attempted through the medium of a trust, the general rule nevertheless obtains and the grantor remains accountable for the income. The decision below is therefore in substantial conflict with this line of cases.

Under those decisions the assigned income is treated as gross income of the assignor, and the income here must likewise be included in the taxpayer's gross income which is broadly defined in Section 22 (a). He may not contend that, since he has established a trust, he must be taxable, if at all, only under the trust provisions of the statute, for it has been established that the trust provisions and Section 22 (a) are not mutually exclusive. *Douglas v. Willcuts*, 296 U. S. 1, 10.

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT H. JACKSON,

Solicitor General.

SEPTEMBER 1939.

The similarity is strikingly illustrated here by the fact that the grantor was also the trustee and had at least as much power in dealing with the corpus as an assignor might have with respect to property the income from which he had assigned.

APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 22. GROSS INCOME.

(a) General Definition.—“Gross income” includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

* * * (U. S. C., Title 26, Sec. 22.)

SEC. 166. REVOCABLE TRUSTS.

Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—

(1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or

(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom,

then the income of such part of the trust shall be included in computing the net income of the grantor. (U. S. C., Title 26, Sec. 166.)

SEC. 167. INCOME FOR BENEFIT OF GRANTOR.

(a) Where any part of the income of a trust—

(1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, held or accumulated for future distribution to the grantor; or—

(2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; or

(3) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in section 23 (c), relating to the so-called "charitable contribution" deduction); then such part of the income of the trust shall be included in computing the net income of the grantor.

(b) As used in this section, the term "in the discretion of the grantor" means "in the discretion of the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of the part of the income in question." (U. S. C., Title 26, Sec. 167.)

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

ART. 166-1 [as amended by T. D. 4629, XV-1 Cum. Bull. 140, 141 (1936), and T. D. 4759, 1937-2 Cum. Bull. 117, 118].

Trusts, with respect to the corpus of which, the grantor is regarded as remaining in substance the owner.—(a) If the grantor of a trust is regarded, within the meaning of the Act, as remaining in substance the owner of the corpus thereof, the income therefrom is not taxable in accordance with the provisions of sections 161, 162, and 163 but remains attributable and taxable to the grantor. This article deals with the taxation of such income. As used in this article, the term “corpus” means any part or the whole of the property, real or personal, constituting the subject matter of the trust.

(b) Section 166 defines with particularity instances in which the grantor is regarded as in substance the owner of the corpus by reason of the fact that he has retained power to revest the corpus in himself. For the purposes of this article the grantor is deemed to have retained such power if he, or any person not having a substantial interest in the corpus or the income therefrom adverse to the grantor, or both, may cause the title to the corpus to revest in the grantor. If the title to the corpus will revest in the grantor upon the exercise of such power, the income of the trust is attributed and taxable to the grantor regardless of—

(1) whether such power or ability to re-take the trust corpus to the grantor's own use is effected by means of a power to revoke, to terminate, to alter or amend or to appoint;

(2) whether the exercise of such power is conditioned on the precedent giving of notice, or on the elapsing of a period of years, or on the happening of a specified event;

(3) the time at which the title to the corpus will revest in the grantor in possession

and enjoyment, whether such time is within the taxable year or not, or whether such time be fixed, determinable, or certain to come;

(4) whether the power to revest in the grantor title to the corpus is in the grantor, or in any person not having a substantial interest in the corpus or income therefrom adverse to the grantor, or in both. A bare legal interest, such as that of a trustee, is never substantial and never adverse;

(5) when the trust was created.

But the provisions of section 166 are not to be regarded as excluding from taxation to the grantor the income of other trusts, not specified therein; in which the grantor is, for the purposes of the Act, similarly regarded as remaining in substance the owner of the corpus. The grantor is regarded as in substance the owner of the corpus, if, in view of the essential nature and purpose of the trust, it is apparent that the grantor has failed to part permanently and definitively with the substantial incidents of ownership in the corpus.

In determining whether the grantor is in substance the owner of the corpus, the Act has its own standard, which is a substantial one, dependent neither on the niceties of the particular conveyancing device used, nor on the technical description which the law of property gives to the estate or interest transferred to the trustees or beneficiaries of the trust. In that determination, among the material factors are: the fact that the corpus is to be returned to the grantor after a specific term; the fact that the corpus is or may be administered in the interest of the grantor; the fact that the anticipated income is being appropriated in advance for the customary expenditures of the grantor or those

which he would ordinarily and naturally make; and any other circumstances bearing on the impermanence and indefiniteness with which the grantor has parted with the substantial incidents of ownership in the corpus.

Thus the grantor is regarded as being in substance the owner of the corpus if, in any case, the trust amounts to no more than an arrangement whereby the grantor, in the ordering of his affairs, finds it expedient to entrust for a period the title to, and custody or management of, certain of his property to a trustee, the income from such property to be used by the trustee during such period to make those expenditures which the grantor would customarily or ordinarily or naturally make and to which the grantor chooses to commit himself in advance, while the corpus is to be held intact, for return in due course to the grantor. In such a case, it is immaterial that, at the time of the creation of the trust, an irrevocable disposition or consummated gift was made of those property rights which consist of the right to the expected future income of the corpus for the specified period. On the other hand, if the grantor, incident to a definitive and permanent disposition of certain of his property, creates the trust in order to conserve the property, not for himself but for the donees, who will ultimately enjoy it, the provisions of sections 161, 162, and 163 are applicable.

(c) For example, a grantor is regarded as remaining in substance the owner of the corpus of the trust, if he has placed it in trust for his son, John.

(A) for the term of three years, at the end of which time the trust might be extended for

a like period at the option of the grantor and successively thereafter, but in the absence of such an extension the title is once more to revest in the grantor in possession and enjoyment; or

(B) for the term of a year and a day, then to be distributed to whomsoever the wife of the grantor shall by deed appoint (the wife not having a substantial adverse interest in the disposition of the corpus or the income therefrom); or

(C) for the term of the grantor's life, then to be distributed to John, the grantor reserving, however, the right to alter, amend, or revoke any provision of the trust instrument, upon notice of a year and a day.

In these typical cases the grantor is regarded as having retained the substantial incidents of ownership with respect to the income-producing property since the corpus will or may once more revest in himself in (A) upon the expiration of the trust period if the grantor does not exercise his option to extend the trust, in (B) upon the designation of the grantor as distributee, by a person not substantially and adversely interested, and in (C) upon the revocation of the trust instrument or an alteration or amendment thereof, resulting in the designation of the grantor as distributee.

(d) If the grantor is regarded as remaining in substance the owner of the corpus the gross income of such corpus shall be included in the gross income of the grantor, and he shall be allowed those deductions with respect to the corpus as he would have been entitled to had the trust not been created.

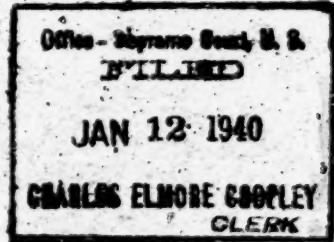
If the grantor strips himself of the substantial incidents or attributes of ownership

in the corpus retained by him so that he ceases to be regarded as in substance the owner of the corpus, the income thereof realized after the effective date of such divesting is not taxable to the grantor but is taxable as provided in sections 161, 162, and 163.

A person may have an interest that is both substantial and adverse to the grantor in the disposition of only part of the corpus or the income therefrom. If the power to revest title in the grantor is vested in him in conjunction with such person, or is vested solely in such person, there is to be excluded in computing the net income of the grantor only the income of such part.

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No. 383

In the Supreme Court of the United States

OCTOBER TERM, 1939

**GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER.**

v.

GEORGE B. CLIFFORD, JR.

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

BRIEF FOR THE PETITIONER

INDEX

| | Page |
|--|------|
| Opinion below..... | 1 |
| Jurisdiction..... | 1 |
| Question presented..... | 2 |
| Statute and regulations involved..... | 2 |
| Statement..... | 2 |
| Specification of errors to be urged..... | 5 |
| Summary of argument..... | 5 |
| Argument..... | 8 |
| I. Respondent was in substance the owner of the trust property and the trust income was therefore properly taxable to him under Section 22 (a) of the Revenue Act of 1934..... | 9 |
| II. The trust income was properly taxable to the respondent under Section 166 of the Revenue Act of 1934..... | 22 |
| III. Taxation of the trust income to respondent is not unconstitutional..... | 28 |
| Conclusion..... | 29 |
| Appendix..... | 30 |

CITATIONS

Cases:

| | |
|---|----------------------|
| <i>Achelis v. Commissioner</i> , decided August 31, 1938..... | 25 |
| <i>Barbour v. Commissioner</i> , 39 B. T. A. 910..... | 25 |
| <i>Blair v. Commissioner</i> , 300 U. S. 5..... | 19, 20, 22 |
| <i>Burnet v. Guggenheim</i> , 288 U. S. 280..... | 16, 17, 21 |
| <i>Burnet v. Leininger</i> , 285 U. S. 136..... | 7, 16, 18 |
| <i>Burnet v. Wells</i> , 289 U. S. 670..... | 16, 17, 21, 28 |
| <i>Canfield v. Commissioner</i> , 31 B. T. A. 724..... | 25 |
| <i>Central Nat. Bank of Cleveland v. Commissioner</i> , B. T. A., August 3, 1939, unreported..... | 25 |
| <i>Chamberlain v. Commissioner</i> , decided March 14, 1939..... | 25 |
| <i>Chase Nat. Bank v. United States</i> , 278 U. S. 327..... | 16 |
| <i>Clapp v. Heiner</i> , 51 F. (2d) 224..... | 24 |
| <i>Commissioner v. Wood</i> , 104 F. (2d) 1013, certiorari granted, November 6, 1939..... | 25 |
| <i>Corliss v. Bowers</i> , 231 U. S. 376..... | 16, 23, 28 |
| <i>Dickey v. Burnet</i> , 56 F. (2d) 917, certiorari denied, 287 U. S. 606..... | 19, 21 |
| <i>Douglas v. Willcuts</i> , 296 U. S. 1..... | 10, 21, 28 |
| <i>Dunning v. Commissioner</i> , 36 B. T. A. 1222..... | 25 |
| <i>DuPont v. Commissioner</i> , 289 U. S. 685..... | 6, 8, 12, 16, 27, 28 |
| <i>Faber v. United States</i> , 1 F. Supp. 859..... | 23 |
| <i>Foster v. United States</i> , 303 U. S. 118..... | 22 |
| <i>Goulder v. Commissioner</i> , 39 B. T. A. 670..... | 25 |

II

Cases—Continued.

| | Page |
|--|--------------------|
| <i>Griffiths v. Commissioner</i> , No. 49, present Term..... | 16, 18, 22, 26 |
| <i>Hassett v. Welch</i> , 303 U. S. 303..... | 12 |
| <i>Helvering v. City Bank Co.</i> , 296 U. S. 85..... | 8, 29 |
| <i>Helvering v. Midland Ins. Co.</i> , 300 U. S. 216..... | 10 |
| <i>Helvering v. New York Trust Co.</i> , 292 U. S. 455..... | 23 |
| <i>Helvering v. Stockholms Bank</i> , 293 U. S. 84..... | 10 |
| <i>Helvering v. Wood</i> , No. 384, October Term, 1939..... | 25 |
| <i>Higgins v. Smith</i> , No. 146, present Term..... | 16, 22 |
| <i>Hoeper v. Tax Commission</i> , 284 U. S. 206..... | 28 |
| <i>Hormel v. Commissioner</i> , 39 B. T. A. 244..... | 25 |
| <i>Horst v. Commissioner</i> , November 13, 1939, 1939 C. C. H. Vol. 4, par. 9766..... | 20 |
| <i>Irwin v. Gavit</i> , 268 U. S. 161..... | 10 |
| <i>Kleinschmidt v. Commissioner</i> , decided August 19, 1939..... | 13 |
| <i>Kraft v. Commissioner</i> , 40 B. T. A. 240..... | 24 |
| <i>Langley v. Commissioner</i> , 61 F. (2d) 796..... | 23 |
| <i>Lewis v. White</i> , 56 F. (2d) 390, appeal dismissed, 61 F. (2d) 1046..... | 23 |
| <i>Lucas v. Earl</i> , 281 U. S. 111..... | 7, 16, 17 |
| <i>McCaughey v. Commissioner</i> , 44 F. (2d) 919..... | 19, 21 |
| <i>McEceley v. Commissioner</i> , 296 U. S. 102..... | 12 |
| <i>Morrissey v. Commissioner</i> , 296 U. S. 344..... | 12 |
| <i>O'Donnell v. Commissioner</i> , 64 F. (2d) 634, certiorari denied, 290 U. S. 699..... | 19, 21 |
| <i>Penn v. Commissioner</i> , B. T. A., April 1, 1939, unreported..... | 13 |
| <i>Randa v. Commissioner</i> , 34 B. T. A. 1107..... | 13 |
| <i>Reinecke v. Smith</i> , 289 U. S. 172..... | 16, 18, 23, 28, 29 |
| <i>Richter v. Commissioner</i> , decided June 12, 1939..... | 25 |
| <i>Saltonstall v. Saltonstall</i> , 276 U. S. 260..... | 16 |
| <i>Sanford v. Commissioner</i> , No. 34, present Term..... | 16, 21, 22 |
| <i>Sawtell v. Commissioner</i> , 82 F. (2d) 221..... | 14 |
| <i>Simpson v. Commissioner</i> , 77 F. (2d) 668..... | 23, 24 |
| <i>Stoddard v. Eaton</i> , 22 F. (2d) 184..... | 19 |
| <i>Sumner v. Commissioner</i> , 40 B. T. A. 810..... | 12 |
| <i>Taft v. Bowers</i> , 278 U. S. 470..... | 29 |
| <i>Taft v. Commissioner</i> , 304 U. S. 351..... | 12 |
| <i>Thomson v. Commissioner</i> , decided December 6, 1938..... | 13 |
| <i>Tyler v. United States</i> , 281 U. S. 497..... | 16, 29 |
| <i>United States v. First Nat. Bank of Birmingham</i> , 74 F. (2d) 360..... | 25 |
| <i>United States v. Jacobs</i> , 306 U. S. 363..... | 16 |
| <i>United States v. Lowden et al.</i> , No. 343, Oct. Term., 1939, decided December 4, 1939..... | 27 |
| <i>United States v. Safety Car Heating Co.</i> , 297 U. S. 88..... | 10 |
| <i>Ward v. Commissioner</i> , 40 B. T. A. 225..... | 25 |
| <i>Wollman v. Commissioner</i> , 31 B. T. A. 37..... | 12 |
| <i>Woolley v. Commissioner</i> , 39 B. T. A. 802..... | 25 |

III

Statutes:

| | |
|---|-----------------------------------|
| 12-13 Geo. 5, c. 17 (1922): | Page |
| Sec. 20 (1), (b)----- | 27 |
| Sec. 20 (2)----- | 27 |
| Revenue Act of 1924, c. 234, 43 Stat. 253, Sec. 219----- | 16, 17, 23 |
| Revenue Act of 1932, Sec. 166, c. 209, 47 Stat. 169----- | 23 |
| Revenue Act of 1934, c. 277, 48 Stat. 680: | |
| Sec. 22 (U. S. C., Title 26, Sec. 22)----- | 5, |
| 6, 8, 9, 10, 11, 12, 20, 21, 22, 26, 28, 30 | |
| Secs. 161, 162, 163----- | 20 |
| Sec. 166 (U. S. C., Title 26, Sec. 166)----- | 5, |
| 7, 8, 9, 11, 12, 21, 23, 24, 25, 26, 27, 28, 30 | |
| Sec. 167 (U. S. C., Title 26, Sec. 167)----- | 31 |
| Revenue Act of 1936, c. 690, 49 Stat. 1648----- | 12 |
| Revenue Act of 1938, c. 289, 52 Stat. 447----- | 12 |
| Internal Revenue Code, 53 Stat. 9, 68----- | 12 |
| Miscellaneous: | |
| 78 Cong. Rec. 6471-6472----- | 23 |
| House Hearings, Revenue Revision, 1934, 73d Cong., 2d Sess., p. | |
| 151----- | 26 |
| T. D. 4629, approved March 7, 1936 (XV-1, Cum. Bull. 140)----- | 11, 32 |
| T. D. 4759, 1937-2 Cum. Bull. 117----- | 12, 32, 36 |
| H. Rep. No. 1385, 73d Cong., 2d Sess., p. 24----- | 23 |
| T. D. 4860, 1938-2 Cum. Bull. 184----- | 36 |
| Treasury Regulations 86, promulgated under the Revenue Act of | |
| 1934: | |
| Art. 22 (a) (1)----- | 31 |
| Art. 166-1----- | 9, 10, 11, 12, 13, 15, 21, 26, 27 |
| Art. 167-1----- | 36 |
| Treasury Regulations 94, promulgated under the Revenue Act of | |
| 1936: | |
| Art. 166-1----- | 12, 26 |
| Treasury Regulations 101, promulgated under the Revenue Act | |
| of 1938: | |
| Art. 166-1----- | 12, 26 |

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BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the United States Board of Tax Appeals (R. 7) is unreported. The opinion of the Circuit Court of Appeals (R. 29) is reported in 105 F. (2d) 586.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 24, 1939 (R. 35). The petition for a writ of certiorari was filed September 13, 1939, and was granted November 6, 1939. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The taxpayer in 1934 declared himself trustee of certain property to pay the net income therefrom to his wife or to hold or accumulate it in his discretion, the trust to terminate at the expiration of five years or upon the earlier death of the taxpayer or his wife. Upon the termination of the trust, the corpus was to be restored to the grantor or his estate but any undistributed net income was to be treated as the property of the wife. The question is whether the net income of the trust for 1934 was properly included in the taxpayer's gross income.

STATUTE AND REGULATIONS INVOLVED

The pertinent statute and regulations are printed in the Appendix, *infra*, pp. 30-38.

STATEMENT

The facts as stipulated (R. 21-27) and as found by the Board of Tax Appeals (R. 7-10) may be summarized as follows:

On June 20, 1934, respondent, a resident of Minnesota, declared himself trustee of certain securities which he owned (R. 7). The trust was to terminate upon the expiration of five years or upon the earlier death of respondent or his wife. Upon termination of the trust the corpus was to be "deemed and treated as property owned absolutely by" the grantor (R. 8).

The declaration of trust provided that all net income from the trust estate received during the continuance of the trust should be held for the benefit of respondent.

ent's wife,' but respondent, as trustee, retained the right to distribute to his wife, quarterly or at such other times as he should deem convenient during any calendar year, the whole or such part of the net income as he in his absolute discretion should determine (R. 7). Any undistributed net income and any proceeds from the investment of any undistributed income remaining at the termination of the trust was to be treated as property owned by the wife (R. 8).

Respondent retained plenary control over the corpus of the trust, including the power to sell, exchange, mortgage, or pledge any of the property upon such terms and conditions and for such consideration as he might deem fitting; to appoint proxies and exercise voting rights; to make investments without limitation of any laws pertaining to the investment of trust funds; to settle any claims; and to hold any trust property in the names of other persons, or in his own name as an individual (R. 8). He exonerated himself from any liability as trustee except for "wilful and deliberate" misconduct (R. 8). And, except as provided above, no title in or to the trust estate or any income therefrom was to vest in his wife; neither the principal nor any undistributed income was to be chargeable ~~to~~ ^{for} her debts; and she was to have no power to encumber

¹ However, the trust instrument provided that (R. 8):
 "5. Extraordinary cash dividends, any dividends paid in stock or the proceeds received from sale of any subscription rights not exercised, or any enhancement, realized or not, in the value of securities shall be considered and treated as principal and not income."

or dispose of any interest in the trust estate or any income therefrom prior to actual payment or delivery to her (R. 8-9).

Since the creation of the trust, respondent has maintained a separate bank account as trustee in which he has deposited income and cash of the trust. He has paid the net income of the trust to his wife by drawing checks against this account to her order. The larger items of income have generally been paid over to the wife soon after their receipt, while small items have been permitted to accumulate for short periods in the account before payment to the beneficiary. Respondent's wife deposited the income which she received from the trust in her own bank account, intermingling it with her other income and keeping no separate record of its use. Respondent has never withdrawn or used any part of the principal or income of the trust for his own purposes (R. 9-10).

The net income of the trust for the year 1934 was \$10,111.23, which included \$1,160.96 capital gain (R. 11). The capital gain was reported as income taxable to the trust; the remainder of the net income of the trust was reported as taxable income of the wife. Respondent did not report any of the trust income in his own return (R. 10).

The Commissioner determined a deficiency in respondent's return by adding the trust income to respondent's personal income. The Board of Tax Appeals sustained the Commissioner's action (R. 11-12), but the court below reversed (R. 35).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that the income involved was not taxable to the respondent under Section 22 (a) of the Revenue Act of 1934.

(2) In holding that the income involved was not taxable to the respondent under Section 166 of the Revenue Act of 1934.

(3) In holding invalid Article 166-1 of Treasury Regulations.86 as applied to the facts of this case.

(4) In reversing the decision of the Board of Tax Appeals.

SUMMARY OF ARGUMENT

Respondent is taxable on the trust income here involved both under Section 22 (a) and Section 166 of the Revenue Act of 1934. Section 22 (a) defines in comprehensive terms the income which the taxpayer must report, and this Court has frequently noted that it expresses the intent of Congress to use its power to the full extent.

The statutory language is refined by the Treasury Regulations which make it plain that the income in question is taxable to the respondent. The relevant statutory provisions have been reenacted by Congress, without change, three times since the first promulgation of the regulation. Since the regulation cannot be said to be clearly in conflict with the statute, the repeated reenactment of the statute compels the conclusion that Congress has adopted the administrative construction.

It is clear that in the case of some short-term trusts, the grantor retains the substantial equivalent of ownership. *Du Pont v. Commissioner*, 289 U. S. 685, 688-689. For example, in the case of a trust created for a month or from day to day the trust income would be taxable to the grantor on the theory that he was in substance the owner of the trust property and the income from the property was therefore *his* income within the meaning of Section 22 (a). There is nothing, then, in the use of the irrevocable trust device which necessarily relieves the grantor of the trust from being taxed on the trust income; the question is simply where the line should be drawn between those irrevocable trusts which deprive the grantor of command over the property and those which leave in him the practical equivalent of ownership. This question is one peculiarly for the judgment of the Treasury Department, which is charged with the administration of the tax law. The judgment of that Department, as embodied in its regulations, cannot be said to be arbitrary and should therefore be given effect.

The realistic nature of the regulations is well illustrated by the present record. The transfer made by the taxpayer did not in any real sense change his economic position. Analysis of the deed of trust shows that he kept plenary control over the corpus of the trust and had substantial rights in the distribution of the income from the trust property, the only restriction being that at the termination of the trust all income not paid over to the beneficiary was to be "deemed and treated" as her property. The practical effect of the transaction

was not the transfer of any rights in the property from the respondent to his wife but merely an advance commitment by the respondent as to the manner in which he would apply future income from the property.

Since respondent retained full control of the securities he conveyed to himself as trustee; he can escape taxation on the income only if he has acquired immunity because he holds legal title as trustee rather than as an individual, or because he has declared in advance that the income is to be that of his wife. The fact that he holds legal title as trustee does not afford such immunity because, as this Court has frequently announced, the reach of the taxing acts is to be determined by the practical substance of transactions rather than by the technical refinements of title. And the fact that respondent declared in advance that the income from the property should be that of his wife is similarly unavailing, since the decisions of this Court foreclose any contention that tax liability can be escaped by the assignment of future income. *Lucas v. Earl*, 281 U. S. 111; *Burnet v. Leininger*, 285 U. S. 136.

Moreover, the trust income was taxable to respondent under Section 166 of the Revenue Act of 1934, which provides that where a grantor has at any time the power to revest title to any part of the corpus of a trust in himself, the income from such part shall be included in computing his net income. The grantor's rights in the present case were no less than he would have had by creating a trust to last for a longer period but reserving a complete right of revocation at the end of five years. In either event the statute requires the income to be taxed to the grantor.

The decision of the court below furnishes taxpayers precisely the type of loophole which Congress has been assiduous in attempting to prevent. It permits the avoidance of surtaxes by a device which, to the average man, means a mere change of bookkeeping methods rather than a substantive alteration of his financial status. Congress clearly did not intend so to exalt form over substance.

There can be no real question as to the power of Congress to tax to the grantor the income of a short-term trust such as that here involved. This Court has frequently held that tax liability may rest upon the enjoyment by the taxpayer of rights in property so substantial and complete as to make it reasonable and just to deal with him as if he were the owner. That the grantor of a short-term trust has such substantial attributes of ownership as to bring him within this rule was decided in *Du Pont v. Commissioner*, 289 U. S. 685. Furthermore, taxation of the trust income to the respondent is within the power of Congress to prevent facile escape from the surtaxes which it has prescribed. *Helvering v. City Bank Co.*, 296 U. S. 85.

ARGUMENT

The respondent, we urge, is taxable on the trust income paid to his wife under the provisions of both Section 22 (a) and Section 166 of the Revenue Act of 1934. Section 166 merely defines with particularity instances in which the grantor of the trust is regarded as in substance the owner of the corpus and therefore as properly taxable on the trust income as *his* income within the broad definition of income contained in

Section 22 (a). Regulations 86, Article 166-1 (b), *infra*, pp. 32, 33. Section 22 (a) is the basic provision and consequently, even if the trust here involved does not fall within the terms of Section 166, income from the trust may none the less be taxable to the grantor under Section 22 (a) if, as we contend, the grantor is properly to be regarded as remaining in substance the owner of the corpus. We shall first discuss the broader question and, second, the scope of Section 166.

I

RESPONDENT WAS IN SUBSTANCE THE OWNER OF THE TRUST PROPERTY AND THE TRUST INCOME WAS THEREFORE PROPERLY TAXABLE TO HIM UNDER SECTION 22 (A) OF THE REVENUE ACT OF 1934

1. Section 22 (a) defines in broad and comprehensive terms, the income which the taxpayer must report as his gross income. That income includes "gains, profits, and income * * * growing out of the ownership or use of or interest in such property" or derived "from interest, rent, dividends, securities * * * or gains or profits and income derived from any source whatever."

The respondent declared himself trustee of securities which he owned; during the five-year trust period their income was to be paid to his wife as beneficiary. The securities were to revert to the absolute ownership of respondent at the termination of the trust; as trustee he had full powers of management and control of the securities. There is no occasion minutely to examine the particular words of Section 22 (a). This Court has

frequently noted that this section shows the intent of Congress "to use its power to the full extent." *Douglas v. Willcuts*, 296 U. S. 1, 9; *Irwin v. Gavit*, 268 U. S. 161; *Helvering v. Stockholms Bank*, 293 U. S. 84, 89; *United States v. Safety Car Heating Co.*, 297 U. S. 88, 93; *Helvering v. Midland Ins. Co.*, 300 U. S. 216, 223. As we show at a later point (*infra*, pp. 28-29), there is no real question of the constitutional power of Congress to tax respondent on this income. It should follow, without more, that Section 22 (a) subjects respondent to liability.

2. The Treasury Regulations refine the statutory language and make it plain that the income in question is reached by Section 22 (a). Article 166-1 of Regulations 86, *infra*, pp. 32-36, issued under the Revenue Act of 1934, contains an elaborate commentary upon the use of the trust device to reduce surtax liability. It points out that the trust income is to be taxed to the grantor if he is to be regarded as remaining in substance the owner of the property. The general criteria are well stated:

In determining whether the grantor is in substance the owner of the corpus, the Act has its own standard, which is a substantial one, dependent neither on the niceties of the particular conveyancing device used, nor on the technical description which the law of property gives to the estate or interest transferred to the trustees or beneficiaries of the trust. In that determination, among the material factors are: the fact that the corpus is to be returned to the grantor after a specific term; the fact that the corpus is

or may be administered in the interest of the grantor; the fact that the anticipated income is being appropriated in advance for the customary expenditures of the grantor or those which he would ordinarily and naturally make; and any other circumstances bearing on the impermanence and indefiniteness with which the grantor has parted with the substantial incidents of ownership in the corpus.

These criteria are illustrated, so as to leave no doubt as to their applicability here, as follows:

For example, a grantor is regarded as remaining in substance the owner of the corpus of the trust, if he has placed it in trust for his son, John.

(A) for the term of three years, at the end of which time the trust might be extended for a like period at the option of the grantor and successively thereafter, but in the absence of such an extension the title is once more to revest in the grantor in possession and enjoyment; * * *

Article 166-1 was originally issued under Section 166 alone. But on March 7, 1936, it was amended (T. D. 4629, XV-1 Cum. Bull. 140) to indicate that its authority came from Section 22 (a) as well as Section 166.²

² The regulations as amended state:

"(b) Section 166 defines with particularity instances in which the grantor is regarded as in substance the owner of the corpus by reason of the fact that he has retained power to revest the corpus in himself. * * *

"But the provisions of section 166 are not to be regarded as excluding from taxation to the grantor the income of other

Subsequent regulations have left the Article unchanged.³

Since the first promulgation of this Article, Congress has three times reenacted, without change, Sections 22 (a) and 166 of the Revenue Act of 1934. Revenue Act of 1936, c. 690, 49 Stat. 1648; Revenue Act of 1938, c. 289, 52 Stat. 447; Internal Revenue Code, 53 Stat. 9, 68. Since the regulation cannot be said to be clearly in conflict with the statute, the repeated reenactment of the statute compels the conclusion that Congress has adopted the administrative construction. *Taft v. Commissioner*, 304 U. S. 351, 357; *Hasselt v. Welch*, 303 U. S. 303, 312; *McFeeley v. Commissioner*, 296 U. S. 102, 108; *Morrissey v. Commissioner*, 296 U. S. 344, 355.

3. There would, we believe, be no dispute that the respondent would be taxable upon the trust income had the trust been declared for a day-to-day or a month-to-month period.⁴ *Du Pont v. Commissioner*, 289 U. S.

trusts, not specified therein, in which the grantor is, for the purposes of the Act, similarly regarded as remaining in substance the owner of the corpus. The grantor is regarded as in substance the owner of the corpus, if, in view of the essential nature and purpose of the trust, it is apparent that the grantor has failed to part permanently and definitively with the substantial incidents of ownership in the corpus."

³ Article 166-1 of Regulations 94, under the 1936 Act, is identical with the Article as amended in Regulations 86 (see T. D. 4759, 1937-2 Cum. Bull. 117), and Article 166-1 of Regulations 101, under the 1938 Act, retains the same language with two minor transpositions in the order.

⁴ Thus, in *Sumner v. Commissioner*, 40 B. T. A. 810, the Board of Tax Appeals held that where a taxpayer declares himself trustee for one year to pay the income to his wife, his "control and dominion over the *res* is so substantially the same as it had been while he was unqualified owner as to justify taxing him irrespective of the trust." See, also, *Woffman v. Commissioner*,

685, 688-689. On the other hand, the income of a long term irrevocable trust which committed the possession and control of the corpus to an independent trustee would not likely be taxed to the settlor merely because of a reversionary interest. The question here, as in many other tax problems, is simply one of degree. The grantor's liability to tax must depend upon whether he retains so many of the attributes of ownership as to require that he be treated as the owner for tax purposes, or whether he has given up the substance of his dominion and control over the trust property.

Under these circumstances, the question of precisely where the line should be drawn between those irrevocable trusts which deprive the grantor of command over the trust property and those which leave in him the practical equivalent of ownership is, in our view, a matter peculiarly for the judgment of the agency charged with the administration of the tax law. The judgment of the Treasury Department is embodied in Article 166-1 of Regulations 86, quoted above (pp. 10-11). These regulations certainly cannot be said to be so arbitrary as to be clearly in conflict with the statutory provision.

31 B. T. A. 37; *Rands v. Commissioner*, 34 B. T. A. 1107; *Kleinschmidt v. Commissioner*, decided by the Board of Tax Appeals on August 19, 1939, unreported memorandum opinion; *Thomson v. Commissioner*, decided by the Board of Tax Appeals on December 6, 1938, unreported memorandum opinion, appeal to the Circuit Court of Appeals for the Eighth Circuit pending; *Penn v. Commissioner*, decided by the Board of Tax Appeals on April 1, 1939, unreported memorandum opinion, appeal to the Circuit Court of Appeals for the Eighth Circuit pending.

To the contrary, the realistic nature of the regulations is well illustrated by the present record. The transfer made by the taxpayer here did not in any real sense change his economic position. It is a fair assumption that after he had declared himself trustee of the securities, he did not consider himself any poorer than he was before and that his wife did not consider herself any richer. The practical effect of the transaction was not the transfer of property from husband to wife but was, in essence, merely an advance decision by the husband as to the manner in which he desired to apply future income from his property. He did not restrict himself in any way with respect to the sale, exchange, mortgage, pledge, or loan of the corpus of the trust. In the case of a sale he could reinvest the proceeds in any way he chose. He could exercise or appoint proxies to exercise all voting powers with respect to stock in the trust estate. He retained broad powers over even the income of the trust, since, as trustee, he was to pay to his wife at any particular time only such part of the income as he, in his absolute discretion, might determine, the sole restriction being that at the termination of the trust all accrued or undistributed income was to be "deemed and treated" as property of the wife. The wife was to have no title in the principal or income of the trust, neither the principal nor income

Indeed, so much of the income as represented capital gain (\$1,160.96 in 1934; R. 11) was to be treated as principal and returned to respondent at the termination of the trust (R. 8). Had we preserved the point, respondent would seem indisputably taxable upon this income under Section 167 (*infra*, p. 31). See *Sawtell v. Commissioner*, 82 F. (2d) 221, 223 (C. C. A. 1st).

was to be chargeable for her debts, and she had no power to sell, transfer, encumber, or in any manner anticipate or dispose of any income from the trust property prior to its actual payment or delivery to her.

In other words, the taxpayer was to remain in effect the owner of the property, the only practical change in his status being that, instead of deciding how to use the income from the property as he received it, he decided in advance to give it to his wife. It is evident, we think, that Article 166-1 cannot be said to be arbitrary or in clear conflict with the statute in prescribing that this income must be taxed to the respondent. The Regulation should, therefore, be given effect.

4. The case seems also to be clear on principle. Respondent under the trust deed retained full control of the securities he conveyed to himself as trustee; the fiduciary obligations he assumed were simply to distribute the ordinary income of the securities to his wife (or to hold it as hers). Respondent can escape taxation on the income only if he has acquired immunity because he holds legal title as trustee rather than as an individual, or because he has declared in advance that the income is to be that of his wife. Neither factor, under settled rules, is sufficient to place respondent beyond the reach of the taxing act.

If tax questions were to be determined by technical niceties, it is probable that the Commissioner after plunging into the intricacies of trust conveyancing should solemnly have concluded that respondent as an individual had parted with title to the securities and that they were now owned by respondent as a trustee,

with the consequence that the tax on their income should be paid by respondent as trustee, or his wife as beneficiary, rather than by respondent as an individual. But taxation is not to be controlled by the fictions and *elegantia* of the trust device. It is, as this Court has noted, an "eminently practical" matter. *Tyler v. United States*, 281 U. S. 497, 503; *United States v. Jacobs*, 306 U. S. 363, 370. The reach of the taxing acts is to be determined by the practical substance of transactions, the location of economic benefits, and by the actual command over the property, rather than by the technical refinements of title. *Lucas v. Earl*, 281 U. S. 111, 114-115; *Burnet v. Leininger*, 285 U. S. 136, 141-142; *Burnet v. Guggenheim*, 288 U. S. 280, 283; *Sanford v. Commissioner*, No. 34, this Term; *Griffiths v. Commissioner*, No. 49, this Term; *Higgins v. Smith*, No. 146, this Term.

Du Pont v. Commissioner, 289 U. S. 685, shows that these settled principles have direct application to the short-term trust. In that case the validity of Section 219 (h) of the Revenue Acts of 1924 and 1926, taxing to the settlor trust income used to pay premiums on policies of insurance on the settlor's life, was upheld as applied to a three-year irrevocable trust. The Court stated that the case was governed by *Burnet v. Wells*, 289 U. S. 670, decided the same day, in which the same statute had been upheld as applied to an irrev-

"See, also, the decisions on the constitutional scope of the taxing powers of Congress. *Chase Nat. Bank v. United States*, 278 U. S. 327, 338; *Corliss v. Bowers*, 281 U. S. 376, 378; *Burnet v. Wells*, 289 U. S. 670, 678; *Reinecke v. Smith*, 289 U. S. 172, 177; cf. *Saltonstall v. Saltonstall*, 276 U. S. 260, 271.

able trust which was to continue during the grantor's life. The Court, however, added (pp. 688-689):

* * * *Here the grantor did not divest himself of title in any permanent or definitive way, did not strip himself of every interest in the subject matter of the trust estate. During a term of three years, the trustee was to apply the income to the preservation of the policies, and while thus applying the income was to hold the principal intact for return to the grantor unless instructed to retain it longer. The situation in its legal effect would not be greatly different if the trusts had been created for a month or from day to day. One who retains for himself so many of the attributes of ownership is not the victim of despotic power when for the purpose of taxation he is treated as owner altogether. [Italics supplied.]*

That case, it is true, was concerned only with the constitutional power of Congress. But four Justices, who were of opinion that Section 219 (h) was unconstitutional as applied to the long-term trusts in the *Wells* case, concurred in the *Guggenheim* case because, as stated above, the short-term trusts were insufficient to break the taxpayer's real ownership of the corpus.

The decisions of this Court foreclose any argument that tax liability can be escaped by the assignment of future income. In *Lucas v. Earl*, 281 U. S. 111, the Court held income received for personal services taxable although it had been assigned to another. The case, the Court said, was "not to be decided by attenuated subtleties" but in recognition that the section defining gross income was intended to exercise the

power of Congress to "provide that the tax could not be escaped by anticipatory arrangements and contracts however skillfully devised" (pp. 114-115). The Court took this principle one step nearer the facts of the present case in *Burnet v. Leininger*, 285 U. S. 136. There the husband was held taxable on his partnership income although he had assigned one-half of his interest to his wife as a partner in that interest; the assignment there related to the income derived from a combination of property and personal services (285 U. S. at 141). It seems plain enough that the decisions are equally applicable to the assignment of income from property alone: "This court has repeatedly said that such an assignment, where the assignor continued to own the corpus, does not immunize him from taxation upon the income." *Reinecke v. Smith*, 289 U. S. 172, 177.

It is true, since the *Smith* case just quoted related to constitutionality, that this Court has never squarely held that an assignment of income from property by means of a trust device was ineffective to relieve the assignor of the tax burden. But the Court has applied the doctrine of the *Earl* case in a situation considerably removed from a simple assignment. In *Griffiths v. Helvering*, No. 49, this Term, the Court held that the assignment of stock, to be sold at a large profit, to a controlled corporation did not relieve the assignor of taxation upon the profit formally realized by the corporation. It said:

We cannot too often reiterate that "taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the

tax is paid." *Cochiss v. Bowers*, 281 U. S. 376, 378. And it makes no difference that such "command" may be exercised through specific retention of legal title or the creation of a new equitable but controlled interest, or the maintenance of effective benefit through the interposition of a subservient agency. * * *

The applicability of these principles to the trust device is well illustrated by the decisions of the lower courts, which even before the enactment of the predecessor of Section 166 held that the income of a revocable trust would be taxed to the grantor under the broad definition of gross income found in the revenue acts. *McCauley v. Commissioner*, 44 F. (2d) 919 (C. C. A. 5th); *Dickey v. Burnet*, 56 F. (2d) 917 (C. C. A. 8th), certiorari denied, 287 U. S. 606; *O'Donnell v. Commissioner*, 64 F. (2d) 634 (C. C. A. 9th), certiorari denied, 290 U. S. 699; see also *Stoddard v. Eaton*, 22 F. (2d) 184, 187 (D. Conn.). There is no difference of substance between a short-term trust and a revocable trust (see *infra*, pp. 24-26); the respondent's powers of control and his substantial ownership of the corpus in this case were, for all practical purposes, as great as those of the grantor of the ordinary revocable trust. The income from the securities held in trust, in either situation, is included within the broad reach of Section 22 (a).

Blair v. Commissioner, 300 U. S. 5, upon which respondent places great reliance, does not qualify our position. In that case the taxpayer, who was the life beneficiary of a testamentary trust, assigned certain income interests under the trust to his children, reserv-

ing to himself only the right to a return of those interests should the assignees predecease him. This Court held that he was not taxable on the income paid to his children by the trustees because each assignment was "a complete transfer of the specified interest" (p. 13). The decision, of course, is entirely inapplicable to the present case. The taxpayer there had no command or control over the income-producing properties and he parted with his entire interest in the assigned income except for the possibility of reverter should he outlive the assignees. Here, on the other hand, the taxpayer had extensive rights of possession and control over the trust estate and he was to reacquire absolute ownership of the property after a short period of time. It cannot realistically be said of the taxpayer in the *Blair* case that he retained any of the substantial attributes of ownership; it cannot realistically be said of the taxpayer here that he retained anything less than the substantial equivalent of ownership.⁷

5. It perhaps should be noted explicitly that nothing in the other sections of the Revenue Act of 1934 operate to limit the full sweep of Section 22 (a).

Sections 161, 162, and 163 provide a system for taxing trusts and estates. But these are inapplicable

⁷ *Horst v. Commissioner* (C. C. A. 2d), decided November 13, 1939, not yet reported but found in 1939 C. C. H., vol. 4, par. 9766, is opposed to our general argument. The court held a bond holder not taxable on the interest paid on coupons which, before the due date, he had detached and given to his son. The decision seems wrong, and the Government will shortly file a petition for a writ of certiorari.

where the income is properly to be regarded as that of the settlor. Article 166-1 (a), *infra*, p. 32; *Douglas v. Willcuts*, 296 U. S. 1, 10.

We urge in the second point of this brief that the respondent is also taxable under Section 166, taxing grantors on the income of revocable trusts. But the fact that Congress has defined with particularity certain instances in which Section 22 (a) applies does not contract the scope of the general definition. *Douglas v. Willcuts*, 296 U. S. 1, 10; cf. *Burnet v. Guggenheim*, 288 U. S. 280, 288; *Sanford v. Commissioner*, No. 34, this Term (pamph. pp. 6-7); *McCauley v. Commissioner*, 44 F. (2d) 919 (C. C. A. 5th); *Dickey v. Burnet*, 56 F. (2d) 917 (C. C. A. 8th), certiorari denied, 287 U. S. 606; *O'Donnell v. Commissioner*, 64 F. (2d) 634 (C. C. A. 9th), certiorari denied, 290 U. S. 699.

6. We submit, therefore, that the declaration of trust did not serve to permit respondent to escape taxation upon the income derived from securities over which he retained full control and to which he would shortly regain even the technical title which he conveyed to himself as trustee.

As this Court has noted, "One can read in the revisions of the revenue acts the record of the Government's endeavor to keep pace with the fertility of invention whereby taxpayers had contrived to keep the larger benefits of ownership and be relieved of the attendant burdens." *Burnet v. Wells*, 289 U. S. 670, 675-676. But, the opinion in that case continues, the courts themselves have often blocked escape without insisting upon specific legislative direction, and defeated the expecta-

tion that "The solidarity of the family is to make it possible for the taxpayer to surrender title to another and to keep dominion for himself, or if not technical dominion, at least the substance of enjoyment" (289 U. S. at 677). In consequence, the revenue acts are to be construed to the end that tax liabilities, fairly due from the practical view of command over the economic benefits of the property, cannot be escaped by "a technically elegant arrangement." *Griffiths v. Helvering*, No. 49, this Term. See also *Higgins v. Smith*, No. 146, this Term; *Foster v. United States*, 303 U. S. 118, 120-121; cf. *Sanford v. Commissioner*, No. 34, this Term (pamph. p. 6); *Blair v. Commissioner*, 300 U. S. 5, 12.

The decision below cannot be squared with this salutary rule of construction. It permits the avoidance of surtaxes by a device which, to the average man, means a mere change of bookkeeping methods rather than a substantive alteration of his financial status. We submit with confidence that Congress could not have intended so to exalt form over substance.

II

THE TRUST INCOME WAS PROPERLY TAXABLE TO THE RESPONDENT UNDER SECTION 166 OF THE REVENUE ACT OF 1934

1. Taxation of the trust income to respondent need not depend upon the fact that respondent was in substance the owner of the trust property and the income was therefore taxable to him under Section 22 (a). That result is also required by the specific provisions

of Section 166, *infra*, p. 30. That section, under the heading "Revocable Trusts," provides:

Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—

(1) in the grantor * * *

then the income of such part of the trust shall be included in computing the net income of the grantor.

The provision first appeared as Section 219 (g) of the Revenue Act of 1924, c. 234, 43 Stat. 253. After reenactment in the 1926 and 1928 Acts, it was modified in the Revenue Act of 1932 (sec. 166, c. 209, 47 Stat. 169) to read as above, except that the provision taxed the income to the grantor "where at any time *during the taxable year* the power to revest in the grantor title to any part of the corpus is vested" in him. The validity of Section 219 (g) was sustained. *Corliss v. Bowers*, 281 U. S. 376; *Reinecke v. Smith*, 289 U. S. 172. But the lower courts held it inapplicable where the power to revoke required notice more than a year in advance.⁸ To escape these decisions,⁹ the italicized words were eliminated in the Act of 1934. The problem, therefore, arises only in connection with the section after its amendment in 1934.

⁸ *Langley v. Commissioner*, 61 F. (2d) 796 (C. C. A. 2d), Judge A. N. Hand dissenting; *Lewis v. White*, 56 F. (2d) 390 (D. Mass.), appeal dismissed, 61 F. (2d) 1046 (C. C. A. 1st); *Faber v. United States*, 4 F. Supp. 859 (C. Cls.); see *Simpson v. Commissioner*, 77 F. (2d) 668, 669 (C. C. A. 7th).

⁹ The amendment was made on the floor of the Senate; its purpose is explained by Senator Murphy (78 Cong. Rec. 6471-6472) and in the Conference Report (H. Rep. No. 1385, 73d Cong., 2d Sess., p. 24).

The respondent is clearly within the spirit of Section 166 and can escape its letter only with difficulties too great to surmount in order to contradict the purpose of the Section. Under the terms of the trust deed here involved, title to the trust property was to revert in the grantor at the termination of the trust, either through the expiration of the five-year period or through the earlier death of his wife. If the trust terminated by reason of the grantors' own death prior to the end of the five-year period, title to the trust property was to vest in his estate.

It seems clear that if the grantor had created a trust to continue until the death of himself or his wife, reserving a right to revoke the trust at any time after five years from the date of its creation, the income of the trust would be taxable to him under Section 166. Cf. *Simpson v. Commissioner*, 77 F. (2d) 668 (C. C. A. 7th); *Clapp v. Heiner*, 51 F. (2d) 224 (C. C. A. 3d); *Kraft v. Commissioner*, 40 B. T. A. 240, on appeal to the Circuit Court of Appeals for the Third Circuit. The trust here involved is precisely the same in nature and effect as the trust in the case supposed; the only difference is that in the one case the trust property will be returned to the grantor only if he exercises an option to terminate the trust, whereas in the other case it will be returned to him unless he exercises an option to continue the trust. Clearly Congress could not have intended the provisions of Section 166 to be limited by any distinction so tenuous.

The theory of the court below that Section 166 covers only situations where the grantor retains power to end an otherwise continuing trust estate and does not cover

cases in which the end of the trust after a short period is provided for in the trust indenture itself is, we believe, entirely unrealistic.¹⁰ The rights of the grantor are the same in both situations, and the tax burden attendant upon those rights should therefore also be the same. The argument is that Section 166 relates only

¹⁰ The same theory underlies the decision in *United States v. First Nat. Bank of Birmingham*, 74 F. (2d) 360 (C. C. A. 5th), on the authority of which the Circuit Court of Appeals for the Second Circuit decided *Commissioner v. Wood*, 104 F. (2d) 1013, certiorari granted, November 6, 1939, *Helceering v. Wood*, No. 384, present Term, to be argued together with this case. The Board of Tax Appeals has also held Section 166 to be inapplicable in *Achelis v. Commissioner*, decided by the Board of Tax Appeals on August 31, 1938, unreported memorandum opinion, appeal to the Circuit Court of Appeals for the Second Circuit pending; *Barbour v. Commissioner*, 39 B. T. A. 910, appeal to the Circuit Court of Appeals for the Second Circuit pending; *Chamberlain v. Commissioner*, decided by the Board of Tax Appeals on March 14, 1939, unreported memorandum opinion, appeal to the Circuit Court of Appeals for the Second Circuit pending; *Gouldner v. Commissioner*, 39 B. T. A. 670, appeal to the Circuit Court of Appeals for the Sixth Circuit pending; *Hornel v. Commissioner*, 39 B. T. A. 242, appeal to the Circuit Court of Appeals for the Eighth Circuit pending; *Ward v. Commissioner*, 40 B. T. A. 225, appeal to the Circuit Court of Appeals for the Third Circuit pending; *Central Nat. Bank of Cleveland v. Commissioner*, decided by the Board of Tax Appeals on August 3, 1939, unreported memorandum opinion, appeal to the Circuit Court of Appeals for the Sixth Circuit pending; *Woolley v. Commissioner*, 39 B. T. A. 802, appeal to the Circuit Court of Appeals for the Second Circuit pending; *Richter v. Commissioner*, decided by the Board of Tax Appeals on June 12, 1939, unreported memorandum opinion, appeal to the Circuit Court of Appeals for the Third Circuit pending; *Dunning v. Commissioner*, 36 B. T. A. 1222.

But the Board has not considered the question as free from doubt. See, for example, the dissenting opinion in *Hornel v. Commissioner*, 39 B. T. A. 244, 250; cf. *Cairfield v. Commissioner*, 31 B. T. A. 724.

to "revocable trusts" and not to trusts certain to be terminated; that it applies when the grantor has an executory "power" to revest title in himself but not when he has already exercised that power in the trust deed. This is not a sensible intention to attribute to Congress, and revenue acts as other statutes are to be construed sensibly. *Helvering v. New York Trust Co.*, 292 U. S. 455, 464. "Legislative words are not inert, and derive vitality from the obvious purposes at which they are aimed." *Griffiths v. Helvering*, No. 49, this Term.

2. The doubt which may exist as to the correct interpretation of Section 166 is removed by the Regulations. Article 161-1 of Regulations 86, 94, and 101, promulgated under both Sections 22 (a) and 166, plainly includes the short-term trust as well as the revocable trust among the situations where the income is taxable to the grantor (*supra*, pp. 10-11). Section 166 has three times been reenacted, and the administrative construction has thus received the implied approval of Congress (*supra*, p. 12).

3. It is true that when Congress had the Revenue Act of 1934 under consideration, Mr. Roswell Magill, Acting Secretary of the Treasury, made the following recommendation to the House Ways and Means Committee (H. Hearings, Revenue Revision, 1934, 73d Cong., 2d Sess., p. 151):

The income from short-term trusts and trusts which are revocable by the creator at the expiration of a short period after notice by him, should be made taxable to the creator of the trust.

But the making of this recommendation at most shows that the Treasury Department had doubts concerning whether Section 166 covered short-term trusts, which doubts it later resolved in favor of taxability by the promulgation of Article 166-1 of Regulations 86; quoted above at pp. 10-11. The fact that the Treasury Department recommended legislation specifically covering short-term trusts does not militate against the conclusion that the statute is broad enough to cover such trusts without a specific provision relating to them. Cf. *United States v. Lowden*, No. 343, this Term; *Higgins v. Smith*, No. 146, this Term. And the fact that Congress failed to adopt the recommendation for a specific provision by no means justifies the conclusion that Congress did not intend to tax to grantors the income from such trusts (*id.*). It may fairly be assumed that after the decision of this Court in May 1933, ~~the~~ *Du Pont v. Commissioner*, 289 U. S. 685, Congress deemed any specific reference to short-term trusts unnecessary, for in that case this Court, as pointed out above (pp. 16-17), stated that such trusts do not differ greatly in legal effect from trusts created for a month or from day to day and that, since the grantor of such a trust does not divest himself of title in any permanent or definitive way, he may, for purposes of taxation, properly be treated as the owner of the trust property.¹¹

¹¹ An English statute (12-13 Geo. 5, c. 17, Sec. 20 (1) (b) (1922)) provides specifically for taxing to the grantor income of a trust or other disposition pursuant to which the income is payable to another person for a period not in excess of six years and further provides (Sec. 20 (2)) that the grantor may recover the tax paid in such a case from the one to whom the income is

III

TAXATION OF THE TRUST INCOME TO RESPONDENT IS NOT
UNCONSTITUTIONAL

It needs no extensive argument to demonstrate the power of Congress to tax the income of a short-term trust to the grantor of the trust. The question was, in effect, decided in *Du Pont v. Commissioner*, 289 U. S. 685, where this Court stated with respect to the settlor of a three-year trust that "One who retains for himself so many of the attributes of ownership is not the victim of despotic power when for the purpose of taxation he is treated as owner altogether" (p. 689). See also *Burnet v. Wells*, 289 U. S. 670, 678; *Douglas v. Wilcutts*, 296 U. S. 1, 9; *Corliss v. Bowers*, 281 U. S. 376, 378; *Reinecke v. Smith*, 289 U. S. 172, 177. Since the grantor in this case remained in control of the trust property and was in substance its owner, the case is distinguishable from *Hooper v. Tax Commission*, 284 U. S. 206, for there the attempt was to tax income arising from property always owned by one other than the taxpayer, who had never had title to or control over either the property or the income from it." *Reinecke v. Smith*, *supra*, at 178.

Moreover, the taxation of the trust income to respondent is within the power of Congress to prevent facile escape from the surtaxes which it has prescribed.

payable. But this special treatment under a comparable statute does not warrant the inference that Congress did not intend to tax trust income to the grantor of a short-term trust under the broad language of Section 166 and Section 22 (a), in the light at least of this Court's statement in the *Du Pont* case.

In *Helvering v. City Bank Co.*, 296 U. S. 85, 90, this Court said:

Congress may adopt a measure reasonably calculated to prevent avoidance of a tax. The test of validity in respect of due process of law is whether the means adopted are appropriate to the end. A legislative declaration that a status of the taxpayer's creation shall, in the application of the tax, be deemed the equivalent of another status falling normally within the scope of the taxing power, if reasonably requisite to prevent evasion, does not take property without due process. * * *

See, also, *Taft v. Bowers*, 278 U. S. 470, 482; *Tyler v. United States*, 281 U. S. 497, 504-505; *Reinecke v. Smith*, *supra*, 178.

CONCLUSION

The judgment of the court below should be reversed.
Respectfully submitted.

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JANUARY 1940.

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APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 22. GROSS INCOME.

(a) General Definition.—“Gross income” includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

* * *

(U. S. C., Title 26, Sec. 22.)

SEC. 166. REVOCABLE TRUSTS.

Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—

(1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or

(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom,

then the income of such part of the trust shall be included in computing the net income of the grantor. (U. S. C., Title 26, Sec. 166.)

SEC. 167. INCOME FOR BENEFIT OF GRANTOR.

(a) Where any part of the income of a trust—

(1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, held or accumulated for future distribution to the grantor; or

(2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; or

(3) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in section 23 (c) relating to the so-called "charitable contribution" deduction);

then such part of the income of the trust shall be included in computing the net income of the grantor.

(b) As used in this section, the term "in the discretion of the grantor" means "in the discretion of the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of the part of the income in question." (U. S. C., Title 26, Sec. 167.)

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

ART. 22 (a)-1. *What included in gross income.*—Gross income includes in general compensation for personal and professional services, business income, profits from sales of and dealings in property, interest, rent, dividends, and

gains, profits, and income derived from any source whatever; unless exempt from tax by law. (See sections 22 (b) and 116.) In general, income is the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets. * * *

ART. 166-1 [as amended by T. D. 4629, XV-1 Cum. Bull. 140, 141 (1936), and T. D. 4759, 1937-2 Cum. Bull. 117, 118]. *Trusts, with respect to the corpus of which, the grantor is regarded as remaining in substance the owner.*—(a) If the grantor of a trust is regarded, within the meaning of the Act, as remaining in substance the owner of the corpus thereof, the income therefrom is not taxable in accordance with the provisions of sections 161, 162, and 163, but remains attributable and taxable to the grantor. This article deals with the taxation of such income. As used in this article, the term "corpus" means any part or the whole of the property, real or personal, constituting the subject matter of the trust.

(b) Section 166 defines with particularity instances in which the grantor is regarded as in substance the owner of the corpus by reason of the fact that he has retained power to revest the corpus in himself. For the purposes of this article the grantor is deemed to have retained such power if he, or any person not having a substantial interest in the corpus or the income therefrom adverse to the grantor, or both, may cause the title to the corpus to revest in the grantor. If the title to the corpus will revest in the grantor upon the exercise of such power, the income of the trust is attributed and taxable to the grantor regardless of—

(1) whether such power or ability to retake the trust corpus to the grantor's own use is effected by means of a power to revoke, to terminate, to alter or amend, or to appoint;

(2) whether the exercise of such power is conditioned on the precedent giving of notice, or on the elapsing of a period of years, or on the happening of a specified event;

(3) the time at which the title to the corpus will revest in the grantor in possession and enjoyment, whether such time is within the taxable year or not, or whether such time be fixed, determinable, or certain to come;

(4) whether the power to revest in the grantor title to the corpus is in the grantor, or in any person not having a substantial interest in the corpus or income therefrom adverse to the grantor, or in both. A bare legal interest, such as that of a trustee, is never substantial and never adverse;

(5) when the trust was created.

But the provisions of section 166 are not to be regarded as excluding from taxation to the grantor the income of other trusts, not specified therein, in which the grantor is, for the purposes of the Act, similarly regarded as remaining in substance the owner of the corpus. The grantor is regarded as in substance the owner of the corpus, if, in view of the essential nature and purpose of the trust, it is apparent that the grantor has failed to part permanently and definitively with the substantial incidents of ownership in the corpus.

In determining whether the grantor is in substance the owner of the corpus, the Act has its own standard, which is a substantial one, dependent neither on the niceties of the particular conveyancing device used, nor on the technical description which the law of property gives to the estate or interest transferred to the trustees or beneficiaries of the trust. In that determination, among the material factors are: the fact that the corpus is to be returned to the grantor after a specific term; the fact that the corpus is or may be administered in the interest of the grantor;

the fact that the anticipated income is being appropriated in advance for the customary expenditures of the grantor or those which he would ordinarily and naturally make; and any other circumstances bearing on the impermanence and indefiniteness with which the grantor has parted with the substantial incidents of ownership in the corpus.

Thus the grantor is regarded as being in substance the owner of the corpus if, in any case, the trust amounts to no more than an arrangement whereby the grantor, in the ordering of his affairs, finds it expedient to entrust for a period the title to, and custody or management of, certain of his property to a trustee, the income from such property to be used by the trustee during such period to make those expenditures which the grantor would customarily or ordinarily or naturally make and to which the grantor chooses to commit himself in advance, while the corpus is to be held intact, for return in due course to the grantor. In such a case, it is immaterial that, at the time of the creation of the trust, an irrevocable disposition or consummated gift was made of those property rights which consist of the right to the expected future income of the corpus for the specified period. On the other hand, if the grantor, incident to a definitive and permanent disposition of certain of his property, creates the trust in order to conserve the property, not for himself but for the donees, who will ultimately enjoy it, the provisions of sections 161, 162, and 163 are applicable.

(c) For example, a grantor is regarded as remaining in substance the owner of the corpus of the trust, if he has placed it in trust for his son, John.

(A) for the term of three years, at the end of which time the trust might be extended for a like period at the option of the grantor and successively thereafter, but in the absence of such

an extension the title is once more to revest in the grantor in possession and enjoyment; or

(B) for the term of a year and a day, then to be distributed to whomsoever the wife of the grantor shall by deed appoint (the wife not having a substantial adverse interest in the disposition of the corpus or the income therefrom); or

(C) for the term of the grantor's life, then to be distributed to John, the grantor reserving, however, the right to alter, amend, or revoke any provision of the trust instrument, upon notice of a year and a day.

In these typical cases the grantor is regarded as having retained the substantial incidents of ownership with respect to the income-producing property since the corpus will or may once more revest in himself in (A) upon the expiration of the trust period if the grantor does not exercise his option to extend the trust, in (B) upon the designation of the grantor as distributee, by a person not substantially and adversely interested, and in (C) upon the revocation of the trust instrument or an alteration or amendment thereof, resulting in the designation of the grantor as distributee.

(d) If the grantor is regarded as remaining in substance the owner of the corpus the gross income of such corpus shall be included in the gross income of the grantor, and he shall be allowed those deductions with respect to the corpus as he would have been entitled to had the trust not been created.

If the grantor strips himself of the substantial incidents or attributes of ownership in the corpus retained by him so that he ceases to be regarded as in substance the owner of the corpus, the income thereof realized after the effective date of such divesting is not taxable to the grantor but is taxable as provided in sections 161, 162, and 163.

A person may have an interest that is both substantial and adverse to the grantor in the disposition of only part of the corpus or the income therefrom. If the power to revest title in the grantor is vested in him in conjunction with such person, or is vested solely in such person, there is to be excluded in computing the net income of the grantor only the income of such part.

ART. 167-1 [as amended by T. D. 4759, *supra*, and T. D. 4860, 1938-2 Cum. Bull. 184]. *Trusts in the income of which the grantor retains an interest.*—(a) *Scope.*—Section 167 prescribes that the income, or any part of the income, of certain trusts shall be taxed to the grantor, not because the grantor has retained a certain interest in the *corpus* of the trust (as in section 166), but because of his retention of a certain interest in the *income* of the trust. This article deals with the taxation of such income. The term “income,” as used in this article, means any part or the whole of the income of the trust.

(b) *Test of taxability to the grantor.*—The test prescribed by the Act as to the sufficiency of the grantor's retained interest in the trust income, resulting in the taxation of such income to the grantor, is whether he has failed to divest himself, both permanently and definitively, of every right which might, by any possibility, enable him to have such income, at some time, distributed to him, either actually or constructively. Such a distribution to the grantor occurs within the meaning of section 167 if the income is paid to him or to another in obedience to his direction or if the income is applied in payment of premiums upon policies of insurance on the grantor's life.

For the purposes of this article, the sufficiency of the grantor's retained interest in the income is not affected by the fact that the grantor has provided that the right to so effect or direct the distribution of income is, or may at some future

time be, vested in any person (either alone or in conjunction with the grantor) not having a substantial interest in the income adverse to the grantor.

If the grantor has retained any such interest in the income, such income is taxable to the grantor regardless of—

(1) whether it may be distributed currently or accumulated for future distribution;

(2) whether such distribution, either current or subject to accumulation, is fixed by the trust instrument or is dependent on an exercise of discretion;

(3) whether, if such distribution is in any way effected by or dependent on an exercise of discretion, the person exercising the discretion is the grantor or a person not having a substantial interest in the income adverse to the grantor, or both. A bare legal interest, such as that of a trustee, is never substantial and never adverse;

(4) the time or times of such distribution, whether within or without the taxable period, whether conditioned on the precedent giving of notice, or on the elapsing of an interval of time, or on the happening of a specified event, or otherwise;

(5) when the trust is created.

Thus the inclusion of any trust within the scope of section 167 is based on the fact that the grantor has retained an interest in the income therefrom by which he is, or may be enabled at some time, to receive its benefits. But the provisions of section 167 are not to be regarded as excluding from taxation to the grantor the income of other trusts, not specified therein, in which the grantor is, for the purposes of the Act similarly regarded as remaining in substance the owner of the trust income. If, for example, trust income is applied in satisfaction of the grantor's

legal obligation whether to pay a debt, to support dependents, to pay alimony, to furnish maintenance and support, or otherwise, such income is in all cases taxable to the grantor.

If the grantor strips himself permanently and definitively of every such interest retained by him, the income of the trust realized after such divesting takes effect is not taxable to the grantor but is taxable as provided in sections 161 and 162.

A person may have an interest that is both substantial and adverse to the grantor in the disposition of only part of the income. There is to be excluded in computing the net income of the grantor only that part of the trust income in the disposition of which such person has a substantial interest adverse to the grantor.

(c) *Income and deductions.*—If, as to any of the income, the test of taxability to the grantor is satisfied, such income shall be included in the gross income of the grantor, and he shall be allowed those deductions with respect to such income as he would have been entitled had such income been distributable currently to him.

FILE COPY
No 383

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Supreme Court of the United States

OCTOBER TERM, 1939.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
PETITIONER,

vs.

GEORGE B. CLIFFORD, JR.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO
THE PETITION FOR WRIT OF CERTIORARI

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INDEX

| | Page |
|---------------------------------------|------|
| Opinion, below | 1 |
| Statement | 1 |
| Argument | 2 |
| Decision on Unambiguous Statute | 2 |
| No Conflict in Decisions | 7 |
| Conclusion | 9 |
| Appendix | 10 |

CITATIONS

Cases:

| | |
|---|------|
| Achelis vs. Commissioner, B. T. A. Docket Nos. 89,435 and 92,359, Memorandum Opinion, August 31, 1938 | 4 |
| Becker vs. St. Louis Union Trust Co., 296 U. S. 48 | 8 |
| Blair vs. Commissioner, 300 U. S. 5 | 6 |
| Bulkwill vs. Commissioner, 77 F. (2d) 569 | 8 |
| Burnet vs. Leininger, 285 U. S. 136 | 8 |
| Chamberlain vs. Commissioner, B. T. A. Docket No. 89,926, Memorandum Opinion, March 14, 1938 | 4 |
| Clifford vs. Helvering, 105 F. (2d) 586 | 2, 4 |
| Commissioner vs. Wood, 104 F. (2d) 1013 | 2, 4 |
| Corning vs. Commissioner, 104 F. (2d) 329 | 2, 8 |
| Douglas vs. Willcuts, 296 U. S. 1 | 6 |
| Downs vs. Commissioner, 36 B. T. A. 1129 | 6 |
| Hornel vs. Commissioner, 39 B. T. A. 244 | 4 |
| Iselin vs. U. S., 270 U. S. 245 | 67 |
| U. S. vs. First National Bank of Birmingham, 74 F. (2d) 360 | 4 |
| U. S. vs. Missouri Pacific Railroad Co., 278 U. S. 269 | 5 |
| Van Meter vs. Commissioner, 61 F. (2d) 817 | 7 |
| Wood vs. Commissioner, 37 B. T. A. 1065 | 4 |

Statutes:

| | |
|---|------|
| Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 166 | 5 |
| Revenue Act of 1934, c. 277, 48 Stat. 680, Sec. 166 | 3, 4 |

Miscellaneous:

| | |
|--|---|
| Bouvier's Law Dictionary (3rd Rev.), pp. 2646-2647, 2954 | 3 |
| C. B. 1938-1, p. 9 (Acquiescence Downs vs. Commissioner) | 6 |
| H. Rep. No. 1385, 73d Cong., 2d Sess., p. 24 | 5 |
| I. T. 3238, C. B. 1938-2, 204 | 6 |
| Treasury Regulations 86, Art. 166-1 | 5 |
| Treasury Department's New Recommendations, C. C. H. Fed. Tax Serv. 1934, Vol. III, p. 6707 | 5 |
| T. D. 4629, C. B. XV-1, 140 | 5 |
| T. D. 4759, C. B. 1937-2, 117 | 5 |

Supreme Court of the United States

OCTOBER TERM, 1939.

**GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
PETITIONER,**

vs.

GEORGE B. CLIFFORD, JR.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

Subsequent to the filing of the petition for a writ of certiorari by the Commissioner, the opinion of the Circuit Court of Appeals (R. 70) has been reported *Clifford vs. Helvering, Commissioner of Internal Revenue*, 105 F. (2d) 586 (C. C. A. 8th, July 19, 1939).

STATEMENT

The respondent declared himself trustee of certain securities (R. 10). As trustee he held "all the net income from the trust estate," "exclusively for the benefit of Virginia R. Clifford" (R. 11). The trust provided in identical terms for distribution of principal and income on the termination of the trust: "all accrued and undistributed net income from the trust estate * * * in my (respondent's) hands as

trustee shall be deemed and treated as property owned absolutely by Virginia R. Clifford * * *, and the remainder of the trust shall be deemed and treated as property owned absolutely by me" (R. 11). The trust defined capital and income (R. 11). The net income of the trust has been distributed to the beneficiary, Mrs. Clifford (R. 13). The respondent as trustee has paid federal income tax upon capital gains, and Mrs. Clifford has paid tax upon net income of the trust from other sources (R. 15). The respondent personally paid federal gift tax upon the value of the trust to Mrs. Clifford (R. 13).

ARGUMENT

Before argument on specific points, it should be noted that the same issues here involved were recently before three different Circuit Courts of Appeal. Each court reached the same conclusion—the trust income is not taxable to settlor:

Corning vs. Commissioner, 104 F. (2d) 329 (C. C. A. 6th, June 6, 1939).

Commissioner vs. Wood, 104 F. (2d) 1013 (C. C. A. 5th, May 29, 1939).

Clifford vs. Commissioner, 105 F. (2d) 586 (C. C. A. 8th, July 19, 1939).

I.

An Adverse Decision by a Circuit Court of Appeals Relating to an Unambiguous Statute Is Not Ground for Certiorari.

The court below did not even consider any claimed unconstitutionality of the statute. The court held, very simply, that an unambiguous statute taxing the income from a revocable trust to the settlor is not applicable to an irrevocable trust.

Section 166 of the *Revenue Act of 1934* (c. 277, 48 Stat. 680) applies only to a revocable trust.¹ The present trust continues for five years or until the earlier death of the settlor or beneficiary (R. 11).² There is no power of revocation vested in anyone. The only right vested in the settlor is a reversion at the end of the trust.

A reversionary interest is not a power of revocation. The decision below which recognizes this manifest distinction is not the proper object of certiorari.

The distinction is clear in legal terminology. *Bouvier's Law Dictionary* (3rd Rev.), pp. 2646-2647, defines a power of revocation as "The right, ability, or faculty". * * * "to divest or abridge an existing estate." *Bouvier's Law Dictionary* (3rd Rev.), p. 2954, defines a reversion as: "*Reversion*. The residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him."

The Circuit Courts of Appeal have unanimously applied the distinction in federal income tax cases. They have unanimously held that a grantor of a trust for the benefit of an

SEC. 166. REVOCABLE TRUSTS.

Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—

(1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or

(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, then the income of such part of the trust shall be included in computing the net income of the grantor. (U. S. C., Title 26, Sec. 166.)

²The trust hereby created shall continue for a term of five (5) years from the date of this Declaration of Trust unless the life beneficiary or myself shall die during said term, and at the expiration of said term or upon the earlier death of the life beneficiary or myself during said term, whichever event shall first occur, the trust hereby created shall forthwith and without any further act or deed terminate.

other for a definite period is not taxable on the income of the trust:

United States vs. First National Bank of Birmingham,
74 F. (2d) 360 (C. C. A. 5th, 1934).

Commissioner vs. Wood, *supra*.

Clifford vs. Helvering, *supra*.

The decisions of the Board of Tax Appeals are also uniform and are to the same effect:

Wood vs. Commissioner, 37 B. T. A. 1065 (1938).

Hornel vs. Commissioner, 39 B. T. A. 244 (1939).

Achelis vs. Commissioner, B. T. A. Docket Nos. 89, 435
and 92, 359, Memorandum Opinion, August 31, 1938.

Chamberlain vs. Commissioner, B. T. A. Docket No. 89,
926, Memorandum Opinion, March 14, 1938.

The Commissioner concedes there is no conflict in the decisions.

The Commissioner apparently does not claim that the income of the present trust is taxable to the respondent under Section 166 except by virtue of legislative history and Treasury Regulations.

It is suggested that the amendment of Section 166 in the *Revenue Act of 1934* (c. 277, 48 Stat. 680), by eliminating the words "during the taxable" and "for such taxable year" had the effect of taxing income of this trust to the respondent. In the generally accepted use of words, however, the section still applies only to revocable trusts. The apparent intention of Congress was to tax revocable trusts in which the power to revoke could be exercised only upon giving notice in the preceding taxable year. The Commissioner suggests collateral records of Congressional proceedings show an intention to cover irrevocable trusts. He neglects, however, to mention that the Treasury Department requested an

amendment covering term trusts as well as revocable trusts and that Congress refused any amendment as to term trusts.

The request of the Treasury Department is contained in *Treasury Department's New Law Recommendations—Statement of the Acting Secretary of the Treasury Regarding the Preliminary Report of a Subcommittee of the Committee on Ways and Means—Additional Recommendations* (C. C. H., Standard Federal Tax Service, 1934, Vol. III, p. 6707) :

“(6) The income from short-term trusts and trusts which are revocable by the creator at the expiration of a short period after notice by him should be made taxable to the creator of the trust.”

The *Revenue Bill of 1934* as introduced in and passed by the House of Representatives did not amend Section 166 of the *Revenue Act of 1932* (Ch. 209, 47 Stat. 169). The Senate did amend Section 166 as to revocable trusts. The conference committee of the two Houses adopted the Senate provision. Report of Conference Committee (73rd Cong., 2d Sess., H. Rept. 1385, p. 24). The Treasury Department had asked Congress for two amendments, one as to term trust, the other as to revocable trusts. Congress gave the Treasury Department one amendment only—that concerning revocable trusts. The Treasury now asks this court for the other amendment refused by Congress.

Departmental Regulations, even if consistent, cannot enlarge the clear language of a statute carrying out Congressional intention. *United States vs. Missouri Pacific Railroad Co.*, 278 U. S. 269. Here, moreover, there has been no uniformity in departmental construction. The original regulation under Section 166 as amended in the *Revenue Act of 1934* was Regulation 86, Article 166-1. This was subsequently amended by T. D. 4629, C. B. XV-1, 140, 141 (1936), and thereafter by T. D. 4759, C. B. 1937-2, 147, 118. The

change and conflict in ruling are readily apparent from a comparison of the present version (printed in the appendix to petitioner's brief, p. 12) and the original regulations (printed in appendix hereto). The original regulation sought to tax the grantor on the income from any trust in which he retained any interest. This position had at least some basis in logic, but it has been abandoned by the Treasury Department in its acquiescence to *Downs vs. Commissioner*, 36 B. T. A. 1129 (1937), C. B. 1938-1, p. 9. In fact, the invalidity of the entire reasoning has been admitted in I. T. 3238, C. B. 1938-2, 204, at p. 205:

"In view of the above decision of the Board of Tax Appeals, in which the Bureau has acquiesced, it is held that inasmuch as the entire income of the trust is distributable to the beneficiary and the possible future re-vesting of the corpus of the trust in the grantor is governed entirely by the terms of the trust instrument itself and is in no way dependent upon the exercise of any power vested in the grantor or any person not having a substantial adverse interest therein, the income of the trust is not taxable to the grantor."

This statement of the Treasury Department is, literally, just as applicable to the case at bar as it was to the *Downs* case, *supra*. There was certainly no uniformity of construction justifying the Congressional adoption of the current departmental regulation. *Iselin vs. United States*, 270 U. S. 245.

Finally, the precise point has been regarded as settled by this court:

Blair vs. Commissioner, 300 U. S. 5.

Douglas vs. Willcuts, 296 U. S. 1.

There is no new important point of law raised by the first suggestion of the Commissioner.

If there is any confusion in the administration of the tax

laws, it is of the Department's own making. It is not shared by the Board of Tax Appeals or by the Circuit Courts of Appeal.

II.

The Decision in This Case Is Not in Conflict With Prior Decisions Dealing With Assignment of Future Income.

The alleged conflict in decisions does not exist. The decisions referred to by petitioner deal with assignment of income. The present decision deals with a transfer of property in trust. In the decisions referred to by the petitioner, the assignor, not the assignee, is liable for tax on income. In the present case, the beneficiary, not the grantor, is liable for the tax.

The exact distinction was carefully considered by the court below, and several cases cited by petitioner in his brief at page 9 were referred to by the court at 105 F. (2d) 590:

"The rule announced in *Lucas vs. Earl*, 281 U. S. 111, 50 S. Ct. 241, 74 L. Ed. 731, and *Burnet vs. Leininger*, 285 U. S. 136, 52 S. Ct. 345, 76 L. Ed. 665, to the effect that the actual earner or recipient of income cannot by assignment avoid the statutory liability is not pertinent, because as owner of the beneficial interest, the beneficiary here is entitled to the income therefrom and is in turn taxed on that income by the statute."

Where there has been an assignment of income as distinguished from a transfer of property, the Circuit Court of Appeals for the Eighth Circuit has followed and applied the decisions of this court that the assignor of future income from earnings or from property owned by him remains liable for tax on such income.

Van Meter vs. Commissioner, 61 F. (2d) 817 (C. C. A. 8th).

The petitioner suggests more particularly that there is conflict between the decision of the Circuit Court of Appeals for the Sixth Circuit in *Bulkwill vs. Commissioner*, 77 F. (2d) 569 (C. C. A. 6th, 1935), and the decision in the present case. There is patently no conflict. In the *Bulkwill* case the taxpayer declared himself trustee of his interest in a partnership without substituting himself as trustee as a partner; the case therefore follows *Burnet vs. Leininger*, 285 U. S. 136. There is absolute harmony in the decisions of these two Circuits. In the only other case where the same argument was applied to a similar set of facts, the United States Circuit Court of Appeals for the Sixth Circuit reached the same result. *Corning vs. Commissioner*, 104 F. (2d) 329 (C. C. A. 6th, June 6, 1939). The court said at page 333:

"There is no ground for support of the Board's determination that the present trusts are not taxable entities or that the instruments amount to no more than an assignment of income. Discretionary powers were vested with the trustee. It is not to be assumed that such powers would not be exercised, or that connivance between the trustee and the grantor would defeat the express purpose of the grants."

The indirect suggestion that this trust should be inoperative for tax purposes because respondent is the trustee is contrary to a decision of this court. *Becker vs. St. Louis Union Trust Co.*, 296 U. S. 48 (1935).

CONCLUSION

It is therefore respectfully submitted that the petition herein for a writ of certiorari should not be granted.

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APPENDIX

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

ART. 166-1. Trusts in the corpus of which the grantor retains an interest.—(a) *Scope.*—Section 166 prescribes that the income, or any part of the income, of certain trusts shall be taxed, not to the trustee nor to the beneficiaries, but to the grantor because of the fact that the grantor has retained a certain interest in the property of the trust. This article deals with the taxation of such income. The term "corpus," as used in this article, means any part or the whole of the property, real or personal, constituting the subject matter of the trust.

(b) *Test of taxability to the grantor.*—The sufficiency of the grantor's retained interest in the corpus resulting in the taxation of its income to the grantor is determined by a single test, namely, whether the grantor has failed to divest himself, permanently and definitively, of every right which might by any possibility enable him once more to possess and enjoy in title the trust corpus. For the purposes of this article the sufficiency of the grantor's retained interest in the corpus is not affected by the fact that the grantor has provided that the right to cause the title to the corpus to revert in himself is, or may at some future time be, vested in any person (either alone or in conjunction with the grantor) not having a substantial interest in the corpus or income therefrom adverse to the grantor.

If the grantor has retained any such interest in the corpus he is taxable on the income therefrom regardless of—

(1) how great or how small, how remote or how contingent the interest may be;

(2) whatever the nature of interest retained may be; whether the interest retained is vested, con-

tingent, in reversion or otherwise; whether conditioned on the precedent giving of notice, or on the elapsing of a period of years, or on the happening of a specified event; whether taken by appointment, or by designation in the trust instrument, or merely by virtue of the grantor not conveying his whole estate in the corpus, or otherwise;

(3) the time or times at which such interest will re-vest the title in the grantor in possession and enjoyment, whether within or without the taxable year, whether or not the time be fixed, determinable or certain to come;

(4) whether, if the re-vesting in the grantor of title to the corpus is in any way dependent upon the act of anyone, that person be the grantor, or any person not having a substantial interest in the corpus or income therefrom adverse to the grantor, or both. A bare legal interest, such as that of a trustee, is never substantial and never adverse;

(5) when the trust was created.

For example, a grantor has not permanently or definitively divested himself of title to the corpus if he has placed it in trust for his son, John,

(A) for the term of three years, at the end of which time the trust might be extended for a like period at the option of the grantor and successively thereafter, but in the absence of such an extension the title is once more to re-vest in the grantor in possession and enjoyment; or

(B) for the term of a year and a day, then to be distributed to whomsoever the wife of the grantor shall by deed appoint (the wife not being a beneficiary, but being empowered to appoint to anyone other than herself); or

(C) for the term of the grantor's life, then to be

distributed to John, the grantor reserving, however, the right to alter, amend, or revoke any provision of the trust instrument, upon notice of a year and a day.

In these typical cases the grantor has provided that the title shall or may once more revert in himself by the retention of an interest (executory or otherwise) capable of vesting title in the grantor in possession and enjoyment, in (A) upon the expiration of the trust period if the grantor does not exercise his option to extend the trust, in (B) upon the designation of the grantor as distributee, by a person not substantially and adversely interested, and in (C) upon the revocation of the trust instrument or an alteration or amendment thereof, resulting in the designation of the grantor as distributee.

Thus the inclusion within the scope of section 166 of any trust is based on the fact that the grantor has retained an interest in the corpus which once more will, or may possibly, vest the title in him in possession and enjoyment. Section 166 makes no distinction between a "revocable trust" (so called because of a provision in the trust instrument permitting some person at some time or in some manner to terminate the trust) and an "irrevocable trust" as such. Some "revocable trusts" are within the scope of section 166, not however by reason of the element of revocability, but because the grantor has reserved the requisite interest in the trust corpus, whether the vesting in title of such interest depends on revocation or otherwise. If no such interest has been retained, a "revocable trust" is not within the scope of section 166, even though the particular trust estate is subject to revocation by the grantor.

If the grantor strips himself permanently and definitively of every such interest in the corpus retained by him, the income of the trust realized after the effective date of such divesting is not taxable to the grantor but is taxable as provided in sections 161 and 162.

(c) *Income and deductions.*—If, as to any of the corpus, the test of taxability to the grantor is satisfied, the gross income of such corpus shall be included in the gross income of the grantor, and he shall be allowed those deductions with respect to such corpus as he would have been entitled to had the trust not been created.

Supreme Court of the United States

OCTOBER TERM, 1939

No. 383

**GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER,**

vs.

GEORGE B. CLIFFORD, JR.

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT.**

BRIEF FOR THE RESPONDENT

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INDEX.

| | Page |
|---|------|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statute involved | 2 |
| Statement | 2 |
| Summary of argument | 3 |
| Argument | 5 |
| I. Respondent was not in substance the owner of the trust
property | 5 |
| II. The Trust is not revocable | 12 |
| Conclusion | 23 |
| Appendix | 24 |

CASES CITED.

| | Page |
|---|----------|
| Ashforth vs. Commissioner, 26 B. T. A. 1188..... | 17 |
| Becker vs. St. Louis Union Trust Co., 296 U. S. 48..... | 6 |
| Blair vs. Commissioner, 300 U. S. 5..... | 11 |
| Burnet vs. Wells, 289 U. S. 674..... | 22, 23 |
| Commissioner vs. Waterbury, 97 F. (2d) 383 (C. C. A. 2nd)..... | 6 |
| Corning vs. Commissioner, 36 B. T. A. 301..... | 9 |
| Corning vs. Commissioner, 104 F. (2d) 329 (C. C. A. 6th)..... | 9 |
| Downs vs. Commissioner, 36 B. T. A. 1129..... | 19, 20 |
| Dunning vs. Commissioner, 36 B. T. A. 1222..... | 6 |
| Du Pont vs. Commissioner, 280 U. S. 685..... | 4, 8, 23 |
| Estate of Marshall, 179 Minn. 233, 228 N. W. 920..... | 5 |
| Faber vs. United States, 1 F. Supp. 859 (C. Cls.)..... | 17 |
| Federal Trade Commission vs. American Tobacco Co., 264 U. S. 298..... | 23 |
| Heiner vs. Dennon, 285 U. S. 312..... | 23 |
| Higgins vs. Smith, No. 146, this Term..... | 7 |
| Hooper vs. Tax Commission, 284 U. S. 206..... | 23 |
| Irwin vs. Gavit, 268 U. S. 161..... | 11 |
| Iselin vs. United States, 270 U. S. 245..... | 21 |
| Kashland vs. Helvering, 298 U. S. 441..... | 21 |
| Knowlton vs. Moore, 178 U. S. 41..... | 23 |
| Langley vs. Commissioner, 61 F. (2d) 796 (C. C. A. 2nd)..... | 17 |
| Lewis vs. White, 56 F. (2d) 390 (D. Mass.)..... | 17 |
| Lucas vs. Earl, 281 U. S. 111..... | 11 |
| M. E. Blatt Co. vs. United States, 305 U. S. 267..... | 21 |
| McCrory vs. Commissioner, 63 F. (2d) 688 (C. C. A. 5th)..... | 6 |
| Poe vs. Seaborn, 282 U. S. 101..... | 8 |
| Reinecke vs. Northern Trust Co., 278 U. S. 339..... | 6 |
| Sanford's Estate vs. Commissioner, No. 34, this Term..... | 13 |
| Smietanka vs. First Trust and Savings Bank, 257 U. S. 602..... | 4, 9, 21 |
| United States vs. First National Bank of Birmingham, 74 F. (2d) 360 (C. C. A. 5th)..... | 14 |
| United States vs. Missouri Pacific Railroad Co., 278 U. S. 269..... | 21 |
| Wood vs. Commissioner, 37 B. T. A. 1065..... | 16 |

STATUTES.

| | |
|---|-------|
| 12-13 Geo. 5, c. 17 (1922):..... | |
| Sec. 20..... | 22 |
| Mason's Minnesota Statutes (1927), §8090..... | 5 |
| Revenue Act of 1913, c. 16, 38 Stat. 114: | |
| Par. B (1)..... | 9, 10 |
| Revenue Act of 1916, c. 463, 39 Stat. 756: | |
| Sec. 2 (b)..... | 3 |
| Revenue Act of 1924, c. 234, 43 Stat. 253: | |
| Sec. 219 (a)..... | 3 |
| Sec. 219 (b)..... | 3 |
| Sec. 219 (g)..... | 3, 16 |

| | |
|--|-----------------------|
| Revenue Act of 1926, c. 27, 44 Stat. 9: | |
| Sec. 219 (g)..... | 3 |
| Revenue Act of 1928, c. 852, 45 Stat. 791: | |
| Sec. 161 | 3 |
| Sec. 162 | 3 |
| Sec. 166 | 3, 14 |
| Revenue Act of 1932, c. 209, 47 Stat. 169: | |
| Sec. 166 | 3, 10, 18 |
| Sec. 167 | 10, 18 |
| Revenue Act of 1934, c. 277, 48 Stat. 680: | |
| Sec. 22 | 24 |
| Sec. 22 (a)..... | 2, 9 |
| Sec. 161 | 3 |
| Sec. 162 | 3 |
| Sec. 166 | 2, 10, 12, 17, 21, 24 |

MISCELLANEOUS AUTHORITIES.

| | |
|---|----------------|
| C. C. H.—Standard Federal Tax Service 1934—Vol. III, Pages | |
| 6673, 6697, 6707..... | 18 |
| 78 Cong. Rec. 6471-6472..... | 17 |
| Cumulative Bulletin—1938—1, p. 9..... | 20 |
| G. C. M. 4208, C. B. VII—2, 142..... | 7 |
| I. T. 3238, Cum. Bull. XVII—2, p. 204..... | 20 |
| Report, Conference Committee, 73d Cong., 2d Sess., H. Rept. 1385. | 17 |
| T. D. 4629, XV—1, Cum. Bull. 140..... | 19 |
| Treasury Regulations 77, promulgated under the Revenue Act of 1932: | |
| Art. 881 | 10, 18 |
| Treasury Regulations 86, promulgated under the Revenue Act of 1934: | |
| Art. 166-1 | 10, 19, 20, 24 |

TEXT AUTHORITIES.

| | |
|--|----|
| Black's Law Dictionary (Third Edition, 1933)..... | 13 |
| Bouvier's Law Dictionary (Third Revision, 1914)..... | 13 |
| 21 Corpus Juris, 1016, Estates, §179..... | 13 |
| Funk & Wagnall's New Standard Dictionary of the English Language (1937)..... | 13 |
| 4 Paul & Merten's Law of Federal Income Tax, §§34.01, 34.03.... | 3 |
| 1 Scott on Trusts, §17.01..... | 5 |

Supreme Court of the United States

OCTOBER TERM, 1939

No. 383

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER,

vs.

GEORGE B. CLIFFORD, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the United States Board of Tax Appeals (R. 7) is unreported. The opinion of the Circuit Court of Appeals (R. 29) is reported in 105 F. (2d) 586.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 24, 1939 (R. 35). The petition for a writ of certiorari was filed September 13, 1939, and was granted November 6, 1939. The jurisdiction of this court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The taxpayer in 1934 declared himself trustee of certain property to pay the net income therefrom to his wife, the trust to terminate at the expiration of five years or upon the earlier death of the taxpayer or his wife. Upon the termination of the trust, the corpus was to be restored to the grantor or his estate but any undistributed net income was to be treated as the property of the wife. The question is whether the provisions of the Revenue Act of 1934 make the income of the trust taxable to the respondent.

STATUTE INVOLVED

The pertinent statute, Revenue Act of 1934, c. 277, 48 Stat. 680, Section 166, is printed in the Appendix. Petitioner says that Section 22 (a) of the same Act is also pertinent; that section is therefore printed in the Appendix.

STATEMENT

The following additions and corrections are made in the summary of facts at pages 2 to 4 of petitioner's brief:

The respondent had made a gift tax return for 1934, which included the gift in trust to Mrs. Clifford (R. 23). The respondent over a period of years, had made gifts of substantial sums to his wife and children (R. 23). The powers of the respondent as trustee were only those mentioned in the trust instrument (R. 25), which are summarized in petitioner's brief at page 3.

SUMMARY OF ARGUMENT

Income is taxable to the legal owner thereof. This rule is confirmed by specific sections which apply to the income of trusts. Sections 161 and 162 of the Revenue Act of 1934, c. 277, 48 Stat. 680, and corresponding sections of prior revenue acts since 1916 have set up a general scheme for taxation of trusts.¹ Trusts are made taxable entities as individuals and corporations. The income of the trust is taxable to the trust with an additional credit for income currently distributed to beneficiaries, but the beneficiaries of the trust are taxed on the income so distributed. Under the general rule taxing income to the owner and under the specific provisions of the Revenue Act of 1934, the income distributed to Mrs. Clifford is taxable to Mrs. Virginia Clifford and not the respondent.²

The present trust is not within the exception created by Section 166 of the Revenue Act of 1934.³ That section and

¹The trust was made a taxable person in the Revenue Act of 1916, c. 463, 39 Stat. 756, §2 (b). The present scheme was more completely adopted in the Revenue Act of 1924, c. 234, 43 Stat. 253, §219 (a, b). The sections were re-numbered in the sequence of the Revenue Act of 1934, in the Revenue Act of 1928, c. 852, 45 Stat. 791, §§161, 162. See 4 Paul and Mertens, Law of Federal Income Taxation, §§34.01-34.03.

²Capital gains were returned as taxable to the trust (R. 10). The taxability of such capital gains is not before the court. (Petitioner's Brief, 12.)

³Section 166 first appeared in the Revenue Act of 1924, c. 234, 43 Stat. 253, as Section 219 (g). The edition was unchanged in the Revenue Act of 1926, c. 27, 44 Stat. 9, §219 (g) and the Revenue Act of 1928, c. 852, 45 Stat. 791, §166. The section was amended in the Revenue Act of 1932, c. 209, 47 Stat. 169, §166. The original section provided:

"Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to re-vest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor."

its predecessors refer to revocable trusts. This is not a revocable trust in the commonly accepted meaning of the word "revocable." No legislation as to term trusts was intended. The only purpose of the amendment of Section 166 in the Revenue Act of 1934 was to remove the words which limited the application of the section to trusts revocable during the taxable year.

The trust is clearly valid. The owner of property may properly declare himself trustee. There are no provisions in the declaration of trust which are not common in trust instruments. In fact, the petitioner makes no claim that the trust is invalid.

The petitioner argues that respondent is the substantial owner of the trust corpus and is therefore taxable on the income of the trust, but there being no express statute, the Department cannot by its regulations create a new kind of ownership. *Smietanka vs. First Trust and Savings Bank*, 257 U. S. 602. Nor can the absence of a statute be supplied by a regulation on the reasoning that if there had been a statute, it might have been valid. *Du Pont vs. Commissioner*, 289 U. S. 685. The petitioner concedes (Brief, 13) that not all irrevocable term trusts should be taxed to the settlor. The line suggested by petitioner "between those irrevocable trusts which deprive the grantor of command over the trust property and those which leave in him the practical equivalent of ownership," has no basis in statute or judicial precedent. The drawing of such a line, and more particularly the declaration of such a policy, is peculiarly a task for Congress, which is charged with the making of tax laws. If the statutory scheme for taxation of trusts is to be changed, the change must be made by Congress.

ARGUMENT

In order to impose tax on the respondent with respect to trust income which he did not receive, the petitioner urges two propositions: That respondent was in substance the owner of the trust property and income; that the trust was revocable within Section 166. Neither proposition is correct. Respondent is not taxable on trust income.

I.

Respondent Was Not in Substance the Owner of the Trust Property.

1. The petitioner does not question that respondent made a valid trust under the laws of the state of Minnesota. *Mason's Minnesota Statutes (1927)*, §8090; *In re Estate of Marshall*, 179 Minn. 233, 228 N. W. 920; 1 *Scott on Trusts*, §17.01. The Supreme Court of Minnesota said in *Estate of Marshall, supra*, at page 241:

"The state makes much of the fact that Marshall was selected as executive trustee and was by resolution of the trustees empowered to transact the business of the trust as if he were the owner. This is not of great significance in view of what appears to be settled law, that a donor may create a valid trust naming himself as the sole trustee. 39 *Cyc.*, p. 66; 1 *Perry, Trusts* (7 ed.), §96; *Reinecke vs. Northern Tr. Co.*, 278 U. S. 339, 49 S. Ct. 123, 73 L. ed. 410. Moreover, it took more than his own vote to make him executive trustee or to give him the authority which the resolution of all the trustees gave him. He reserved no power over the interest of his wife and children in the trust, nor did the trustees assume to grant him any."

The petitioner does not question the validity of the trust

under Federal tax laws. The respondent may declare himself the trustee of his own property. As trustee, he may retain adequate powers for the proper administration of the trust. *Reinecke vs. Northern Trust Co.*, 278 U. S. 339; *Becker vs. St. Louis Union Trust Co.*, 296 U. S. 48; *Commissioner vs. Waterbury*, 97 F. (2d) 383 (C. C. A. 2nd); *McCroy vs. Commissioner*, 69 F. (2d) 688 (C. C. A. 5th); *Dunning vs. Commissioner*, 36 B. T. A. 1222. In *Reinecke vs. Northern Trust Co.*, *supra*, the court said at page 346:

"Nor did the reserved powers of management of the trusts save to decedent any control over the economic benefits or the enjoyment of the property. He would equally have reserved all these powers and others had he made himself the trustee, but the transfer would not for that reason have been incomplete. The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made. His power to recall the property and of control over it for his own benefit then ceased and as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift *inter vivos* not subject to the tax."

The trust was clearly not one without substance. By the declaration of trust the respondent irrevocably parted with all income from the trust corpus accruing during the five-year period. There was no way that the respondent could reacquire legally the trust income; any action to that end would have amounted to a breach of trust and, criminally speaking, to embezzlement. As a matter of fact, the income of the trust for the year in question was distributed in full to the beneficiary. For the period of the trust the settlor lost the beneficial use of the corpus. He lost the right to make a gift to any one of any part of the corpus; he was under a disability to make a sale of any part of the corpus

to himself individually; the proceeds of a sale to anyone else were subject to the trust and could not be used personally by him; he was unable to make a loan of any part of the corpus to himself; he lost the right to use the trust corpus as collateral to secure personal loans for himself. During the five-year period the petitioner had also undertaken certain duties and responsibilities. He was under a duty to administer the trust for the sole benefit of the beneficiary; he was under a duty to render accurate accounts, and to allow an inspection to the beneficiary; he was under a duty to preserve the trust corpus and enforce claims; and he was obliged to use reasonable care and skill in making the trust property productive.

Because the trust has substance, it differs from the sale, which lacked substance, in *Higgins vs. Smith*, No. 146, this term. After the sale, the taxpayer's balance sheet in that case was the same as before; after the creation of the trust in this case, the respondent had reduced his assets by the value of the trust for the term. After the sale in *Higgins vs. Smith, supra*, the taxpayer could immediately secure return of stock to his personal ownership; after the creation of the trust, the respondent could not regain ownership of his securities for five years. See G. C. M. 4208, C. B. VII-2, 142.

2. The petitioner seeks to have a new administrative policy established as law, to-wit: The income of a trust shall be taxable to the grantor, where in the opinion of the Department the grantor is in substance the owner of the corpus, even though there be a valid trust under the law of the state where it is created, even though it be valid for other Federal tax purposes, and even though it cannot be regarded as lacking in substance.

There is no provision of any Revenue Act thus classifying trusts. Nor is the absence of such a statute dispensed with by referring to decisions of this court which perhaps suggest that if Congress had passed such a statute taxing certain trusts to the grantor, these statutes would be constitutional. *Du Pont vs. Commissioner*, 289 U. S. 685. In that case, the court upheld the constitutionality of an Act of Congress. The Act in clear and specific language taxed the income of a trust to pay premiums on the settlor's life to the settlor. The fact that the trust there involved was for a three-year term was an additional reason for finding that in that instance Congress had not violated due process. The issue here, however, is not as to the power of Congress but as to its intent. *Poe vs. Seaborn*, 282 U. S. 101.

The notion that a person may be taxed on income from property for the reason that he is the substantial owner thereof has been repudiated. *Poe vs. Seaborn*, *supra*. The court said at page 111:

"The commissioner contends, however, that we are here concerned not with mere names, nor even with mere technical legal titles; that calling the wife's interest vested is nothing to the purpose, because the husband has such broad powers of control and alienation, that while the community lasts, he is essentially the owner of the whole community property, and ought so to be considered for the purpose of Sections 210 and 211.

.

"We think in view of the law of Washington above stated this contention is unsound."

In view of the express provisions of the Revenue Act of 1934 and the decisions of this court with relation to trusts, the petitioner's contention here is just as unsound.

Some such general doctrine was used by the Board Mem-

ber in his decision in this case (R. 11). But the correct test was applied by the Circuit Court of Appeals. Do the powers of trustee "defeat" the trust? The court found that they did not (R. 32). The Board Member cited as authority for his view *Warren H. Corning*, 36 B. T. A. 301 (R. 11). This decision was reversed by the Circuit Court of Appeals for the Sixth Circuit. *Corning vs. Commissioner*, 104 F. (2d) 329 (C. C. A. 6th). That court applied the same test and reached the same conclusion with respect to the facts there involved as did the court below in the case at bar. The court said at page 333:

"There is no ground for support of the Board's determination that the present trusts are not taxable entities or that the instruments amount to no more than an assignment of income."

No statutory basis for the new theory can be found in Section 22 (a) of the Revenue Act of 1934. This section is not a general enabling act for departmental definition of income. *Smietanka vs. First Trust and Savings Bank*, 257 U. S. 602. In holding income received by a trustee for the benefit of unborn children was not liable to tax under the Revenue Act of 1913, c. 16, 38 Stat. 114, the court said at page 605:

"No language in the act included a tax on income received by a trustee, by him to be accumulated for unborn or unascertained beneficiaries. There was indicated in the taxing, Par. A, the congressional intention to tax citizens everywhere, and non-citizens, resident in the United States, including persons, natural and corporate, on income from every source, less allowed deductions. But nowhere were words used which can be stretched to include unborn beneficiaries for whom income may be accumulating. It may be that Congress had a general intention to tax all incomes, whether for

the benefit of persons living or unborn, but a general intention of this kind must be carried into language which can be reasonably construed to effect it. Otherwise, the intention cannot be enforced by the courts. The provisions of such acts are not to be extended by implication."

Certainly, the basis for the implication suggested here by petitioner is stronger where the income is not subject to any tax.

This section in practically identical words has been a part of income tax laws since 1913.⁴ Prior to the amendment of Section 166 of the Revenue Act of 1934, there was no regulation like Article 166-1 of Treasury Regulations⁵ attempting to tax the income of term trusts to the settlor.⁶ The uniform construction of Section 22 was contrary to the present construction. The coincidence of the Revenue Act of 1934 and the new Article suggests that Section 166 is the only possible statutory basis for the regulation. The propriety of the regulation as a construction of that section will be discussed in argument under that section.

3. Before proceeding to that argument, a distinction should be noted between an assignment of income and the

⁴Revenue Act of 1913, c. 16, 38 Stat. 114, Par. B (1):

"That, subject only to such exemptions and deductions as are herein-after allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation, or personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits, and income derived from any source whatever including the income from, but not the value of property acquired by gift, bequest, devise, or descent."

⁵See Article 884 of Regulations 77, which does no more than re-state Sections 166 and 167 of the Revenue Act of 1932, c. 209, 47 Stat. 169, under which it issued.

creation of a trust. The actual owner of property and earnings remains liable even after he has assigned the income from the property and the earnings. *Lucas vs. Earl*, 281 U. S. 111. After an owner has transferred his property by sale or gift, the income of that property after the transfer is taxable to the new owner. The owner may give away a fee in some of his real estate or he may give a limited estate in all his real estate. The owner may create a trust for a term of years in a part of his personal property for the benefit of another. The beneficiary becomes the owner of an equitable interest in the property. The income during the term is the income of the beneficiary, not of the settlor. *Lucas vs. Garit*, 268 U. S. 161; *Blair vs. Commissioner*, 300 U. S. 5. By the declaration of trust, Mrs. Clifford became the owner of an equitable interest in the trust *res*; the income during the term is her income, not the income of the respondent. The difference between an assignment and a trust is a difference in kind and not of duration; of quality, not of quantity.

The court below made the distinction clear (R. 32):

"The rule announced in *Lucas vs. Earl*, 281 U. S. 111, and *Burnet vs. Leininger*, 285 U. S. 136, to the effect that the actual earner or recipient of income cannot by assignment avoid the statutory liability is not pertinent, because as owner of the beneficial interest, the beneficiary here is entitled to the income therefrom and is in turn taxed on that income by the statute. As said in *Blair vs. Commissioner*, *supra*:

"These cases are not in point. The tax here is not upon earnings which are taxed to the one who earns them. Nor is it a case of income attributable to a taxpayer by reason of the application of the income to the discharge of his obligation. * * * There is here no question of evasion or of giving effect to statutory pro-

visions designed to forestall evasion; or of the taxpayer's retention of control. * * * In the instant case, the tax is upon income as to which, in the general application of the revenue acts, the tax liability attaches to ownership."

II.

The Trust Is Not Revocable.

The material parts of the statute (Section 166) and of the trust instrument (R. 25) are:

"Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—

"(1) in the grantor, * * *

"then the income of such part of the trust shall be included in computing the net income of the grantor."

"2. The trust hereby created shall continue for a term of five (5) years from the date of this Declaration of Trust unless the life beneficiary or myself shall die during said term, and at the expiration of said term or upon the earlier death of the life beneficiary or myself during said term, whichever event shall first occur, the trust hereby created shall forthwith and without any further act or deed terminate."

The reading of the two provisions does not even suggest that the statute covers this trust. The respondent's reversionary interest following a trust for years is not a "power to revest." This conclusion is confirmed by the accepted meaning of words, the reasoning of prior decisions, and the legislative history of the legislation. Treasury Regulations cannot enlarge, under the guise of construction, the clear meaning of a statute.

1. The words used in the statute have a generally accepted meaning.

A power to revest certainly denotes an ability of grantor or someone else to effect a change in title, ownership, or enjoyment of property by the voluntary doing of an act:

Funk & Wagnall's New Standard Dictionary of the English Language (1937): "1. Ability to act so as to produce some change or bring about some event; * * * 2. Such absence of restraining influence as leaves power of volition to the subject; * * * 4. The right, ability or capacity to exercise authority or control."

Black's Law Dictionary (Third Edition, 1933), and *Bouvier's Law Dictionary* (Third Revision, 1914): "The right, ability, or faculty of doing something."

Reversions and reversionary interests have been defined as follows:

Bouvier's Law Dictionary (Third Revision, 1914): "*Reversion*. The residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him. * * * The reversion is a vested interest or estate and arises by operation of law only."

21 *Corpus Juris* 1016: "*Reversion*. An estate in reversion is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him."

2. The distinction between a reversion and a power to revest has been consistently applied by the courts and the Board of Tax Appeals.

This court has recently so clearly noted the distinction that further authority seems a supererogation. *Sanford's Estate vs. Commissioner*, No. 34, this Term. The court said:

"Nor do we think that the provisions of §219 (g) of the 1924 Act have any persuasive influence on the construction of the gift tax provisions with which we are now concerned. One purpose of the gift tax was to prevent or compensate for the loss of surtax upon income where large estates are split up by gifts to numerous donees. Congress was aware that donors in trust might distribute income among several beneficiaries, although the gift remains so incomplete as not to be subject to the tax. It dealt with *that contingency in §219 (g) which taxes to the settlor the income of a trust paid to beneficiaries where he reserved to himself an unexercised power to 'revest in himself title' to the trust property producing the income.*" (Italics ours.)

The first court decision was under an earlier revenue act. *United States vs. First National Bank of Birmingham*, 74 F. (2d) 360 (C. C. A. 5th). The grantor made a conveyance in trust for *one year* from October 1, 1928, to September 30, 1929. The Commissioner included in grantor's income for 1929 the income of trust from Jan. 1, 1929, to September 30, 1929. The Commissioner invoked Section 166 of the Revenue Act of 1928, which provided that income of a trust was taxable to the grantor if he had "at any time during the taxable year * * * the power to revest in himself title to any part of the corpus of the trust." In holding that the grantor was not taxable on such trust income, the court said at page 362:

"It was not such a trust as is described in the above set out provision of the statute, as the grantor did not have, at any time during the taxable year 1929, or at any other time, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust. By that instrument the entire property rights in the described real estate for the period stated were irrevoc-

cably vested in the grantee. The estate granted being one limited to endure for a definite and ascertained period, fixed in advance, is what is known as an estate for years. *Hyatt vs. Vincennes Nat. Bank*, 113 U. S. 408, 5 S. Ct. 573, 28 L. Ed. 1009; 35 C. J. 970; 10 R. C. L. 662. The corpus of the trust was the granted estate in the described property for the stated period. The income from that property during that period was the grantee's income, not the grantor's income, as it was subject to the unfettered command of the grantee, not subject to any power over it exercisable by the grantor; the source of it being a property interest or estate irrevocably vested in the grantee. * * * (Citing authorities.) The income in question was not taxable against appellee's testator because he did not own that income, or have any beneficial interest therein when it accrued, *and did not have the power either alone or in conjunction with any person not a beneficiary of the trust, to revest in himself the title to the property interest or estate which was the source of that income.*" (Italics ours.)

The language of the court below in the present case is clear on this point (R. 34) :

"The grantor in the instant case was given no power of revocation or revestment. The trust was absolute for the period of five years, except that it might terminate sooner by events beyond the control of the petitioner. Generally, a power of revocation is the reservation of a power in the grantor to put an end to the estate granted. *Tiffany, Real Property*, 2nd Ed., p. 1049. In this Section 166, the word 'revest,' clearly means the power reserved to the grantor to terminate a granted estate. *United States vs. First Natl. Bank of Birmingham* (C. C. A. 5), 74 F. (2d) 360. An existing right in property is not a power, but power is the right, ability or faculty of doing something. *Bouvier's Law Dic-*

tionary, p. 2646. Here, manifestly, petitioner had no power to divest nor abridge the existing estate, and hence, the trust income is not affected by Section 166, *supra*."

The language of the Board in the companion case is similarly clear. *Wood vs. Commissioner*, 37 B. T. A. 1065, 1068:

"In neither the original nor the supplementary declaration of trust was any power of revocation reserved to the petitioner or anyone else. The trust could be terminated only upon the happening of one of the three events specified in the original and supplementary declarations, *viz.*, the death of the grantor or of the beneficiary, or the termination of a five-year period from April 8, 1931, and petitioner, the grantor, had no control over the happening of such events. The trust constituted the grant of an estate for years and the beneficiary became the owner of an equitable interest in the corpus, *Blair vs. Commissioner*, 300 U. S. 5. Since section 166, *supra*, deals only with revocable trusts, and since the trust here in question was not, under the terms of the instruments creating it, revocable at any time during the period fixed for its duration, that section is not applicable in the instant case."

The petitioner has collected most of the other Board cases at page 25 of his brief.

3. The legislative purpose of the 1934 amendment of Section 166 confirms the foregoing conclusion.

A provision similar to Section 166 first appeared as Section 219 (g) of the Revenue Act of 1924, c. 234, 43 Stat. 253. Prior to the 1934 amendment, the provision had taxed income to the grantor "where at any time *during the taxable year* the power to revest in the grantor title to any part of the corpus is vested" in him. A number of decisions had

refused to apply this statute to admittedly revocable trusts, where the trust was not revocable in the taxable year. *Langley vs. Commissioner*, 61 F. (2d) 796 (C. C. A. 2nd); *Lewis vs. White*, 56 F. (2d) 390 (D. C. Mass.); *Ashforth vs. Commissioner*, 26 B. T. A. 1188; *Faber vs. United States*, 1 F. Supp. 859 (C. Cls.). The mere reading of Section 166 of the Revenue Act of 1934 makes it clear that the only object of the amendment was to make it include all trusts where the settlor had a vested right of revocation.⁶ Senator Murphy, when he introduced the proposed amendment made it perfectly clear that this was the purpose (78 Cong., Rec. 6471-6472). The Conference Committee shows the same purpose. *Report—Conference Committee* (73d Cong., 2d Sess., H. Rept. 1385):

"Amendments nos. 96 and 97: Under existing law, the income from a revocable trust is taxable to the grantor only where such grantor (or a person not having a substantial adverse interest in the trust) has the power within the taxable year to revest in the grantor title to any part of the corpus of the trust. Under the terms of some trusts, the power to revoke cannot be exercised within the taxable year, except upon advance notice delivered to the trustee during the preceding taxable year. If this notice is not given within the preceding taxable year, the courts have held that the grantor is not required under existing law to include the trust income for the taxable year in his return. The Senate

⁶The exact amendment appears from the following quotation of Section 166, wherein the words eliminated by the 1934 Revenue Act have been set in boldface.

"Where at any time **during the taxable year** the power to revest in the grantor title to any part of the corpus of the trust is vested—

"(1) in the grantor * * *

"(2) * * *

"then the income of such part of the trust **for such taxable year** shall be included in computing the net income of the grantor."

amendments require the income from trusts of this type to be reported by the grantor. The House recedes (p. 24)."

If further confirmation were needed, it is found in the specific request of the Treasury Department for a provision covering short-term trusts, which request was denied. A subcommittee of the House Ways and Means Committee made a report on a proposed revenue bill. C. C. H., Standard Federal Tax Service, 1934, III, page 6673. The Treasury Department, after examining this report, made a statement regarding it (*ibid.*, page 6697). In this statement, the Treasury suggested certain additional recommendations, including the following (*ibid.*, page 6707):

"(6) The income from short-term trusts and trusts which are revocable by the creator at the expiration of a short period after notice by him should be made taxable to the creator of the trust."

The conclusion seems inescapable: The Treasury desired to amend the revenue laws in two distinct particulars; Congress amended the Act to include "trusts which are revocable by the creator at the expiration of a short period after notice by him"; Congress did not amend the Act to include "short-term trusts."

4. What Congress refused to do, the Department would claim to have accomplished by its Regulations. Regulations 77, Article 881, issued under the Revenue Act of 1932, c. 209, 47 Stat. 169, substantially restated Sections 166 and 167 of the Revenue Act of 1932. There was no suggestion that term trusts were taxable. The theory that reversion in the corpus subjected the grantor to tax on the income of the trust was first incorporated in Treasury Regulations 86, Article 166-1. These regulations purported to tax the in-

come of a trust to the grantor if he retained any interest in the trust "how great or how small, how remote or how contingent the interest may be."⁷ This position had at least the merit of consistency. This view was abandoned in an amendment of Article 166-1 on March 7, 1936 (T. D. 4629, XV-1, Cum. Bull. 140), when the Article was redrafted in substantially its present form.

In *Downs vs. Commissioner*, 36 B. T. A. 1129, the grantor created a trust for her daughter-in-law to the extent of four thousand dollars (\$4,000.00) per annum for life or until her remarriage, any excess of income to be paid to grantor and any deficiency in the income in any year to be made up out of corpus. Upon death or remarriage of the daughter-in-law, the trust was to terminate and the corpus was to revert to the grantor. The Board held four thousand dollars (\$4,000.00) income in the year 1934 was not taxable to the grantor. The Board said at page 1137:

"Respondent has not argued that the possibility of a reversion to the grantor upon the death or re-marriage of Anne Merrick Downs brings the trust within section 166. A possibility of a reverter is, in our opinion, different from 'the power to revest' which is comprehended by section 166. We have here a trust for an indefinite

⁷The original Article 166-1 of Regulations 86 is printed in full in Appendix. The scope of the article appears from the following extract:

"(b) **Test of taxability to the grantor.**—The sufficiency of the grantor's retained interest in the corpus resulting in the taxation of its income to the grantor is determined by a single test, namely, whether the grantor has failed to divest himself, permanently and definitively, of every right which might by any possibility enable him once more to possess and enjoy in title the trust corpus. * * *

"If the grantor has retained any such interest in the corpus he is taxable on the income therefrom regardless of—

"(1) how great or how small, how remote or how contingent the interest may be."

term, '*pour autre vie*' or until the occurrence of a contingency over which the grantor has no control. No exercise of volition by the grantor is required nor would have any effect upon the return of the corpus to her. When and if it returns to the grantor or her assignees or appointees it will return by operation of the terms of the trust instrument itself and not by the exercise of any 'power' retained by the grantor. We believe such a trust is not covered by the terms of intendment of section 166. See *United States vs. First National Bank of Birmingham*, 74 F. (2d) 360, where a trust for a term of one year at the end of which the trust property would revert to the grantor was held to be without the scope of section 166 of the Revenue Act of 1928, which contains language of apparently the same import in the particulars material to this question as section 166 of the Revenue Act of 1934."

The Commissioner acquiesced in this decision. Cum. Bull. 1938—1, p. 9.

Thereafter, the Department issued a definite ruling that a settlor was not taxable on income of a trust because he retained a reversionary interest. E. T. 3238, Cum. Bull. XVII-2, p. 204. "Under a trust indenture dated December ..., 1923, A created a trust for the benefit of his wife. Pursuant to the provisions thereof, he conveyed assets to trustees who were authorized to collect the income therefrom and pay it to his wife annually, or oftener, as long as she lives. Upon her death the principal of the trust, or so much thereof as may remain, is to be paid over to the grantor if living. In the last paragraph of the trust instrument, the grantor expressly reserves to himself the power to alter at any time any terms of the trust but not to revoke the trust or change its provisions so that the income would be paid to him during the lifetime of his wife." After stating the facts, the ruling referred specifically to Article 166-1, Regulations, as

then amended, Section 166 of the Revenue Act of 1934, and *Doens vs. Commissioner, supra*, and then concluded that the income of the trust for 1934 and 1935 was not taxable to the grantor:

"In view of the above decision of the Board of Tax Appeals, in which the Bureau has acquiesced, it is held that inasmuch as the entire income of the trust is distributable to the beneficiary and the possible future revesting of the corpus of the trust in the grantor is governed entirely by the terms of the trust instrument itself and is in no way dependent upon the exercise of any power vested in the grantor or any person not having a substantial adverse interest therein, the income of the trust is not taxable to the grantor."

There is no basis for assuming that Congress adopted the administrative construction by re-enacting without change Section 166 or Section 22 (a). Not only were the regulations without statutory basis, but they were clearly contrary to plain language and the meaning of the statute. *Smietanka vs. First Trust and Savings Bank, supra*; *United States vs. Missouri Pacific Railroad Co.*, 278 U. S. 269; *Kashland vs. Helvering*, 298 U. S. 441; *M. E. Blatt Co. vs. United States*, 305 U. S. 267. Furthermore, the construction has not been uniform. *Iselin vs. United States*, 270 U. S. 245.

5. What seems so clear on principle, is sought to be confused in petitioner's brief by such phrases as these: "There is no occasion minutely to examine the particular words of Section 22 (a) (Brief, 9)"; "there is no real question of the constitutional power of Congress to tax respondent on this income (Brief, 10)"; "since the regulation cannot be said to be clearly in conflict with the statute, the repeated re-enactment of the statute compels the conclusion that Congress has adopted the administrative

construction (Brief, 12)"; "these regulations certainly cannot be said to be so arbitrary as to be clearly in conflict with the statutory provision (Brief, 13)"; "it is evident, we think, that Article 166-1 cannot be said to be arbitrary or in clear conflict with the statute in prescribing that this income must be taxed to the respondent (Brief, 15)"; "*Du Pont vs. Commissioner*, 289 U. S. 685, shows that these settled principles have direct application to the short-term trust (Brief, 16)." The medley confuses several distinct and proper principles. The argument employs as a rule of statutory construction a test of constitutionality. It is a statute and not a constitution which is being interpreted and applied. It is the validity of a regulation and not of a statute that is to be determined. *Burnet vs. Wells*, 289 U. S. 674. The Revenue Act did not give to the Treasury Department the broad power to legislate which the Constitution gives to Congress. There have been those who have suggested that such power is not given to this court. Certainly unambiguous language was available to Congress if in 1934 any such change in law had been contemplated as is now urged by the Commissioner, and the change would have been explained to the members of Congress.

Article 166-1 of the Regulations draws no clear line. If it attempted to do so, it would show more clearly that it is in the nature of legislation. It determines a new policy, which is not referable to any existing statute or established principles. The problem is one for legislative determination.* The method proposed by the Regulations could only result in conflicting rulings in particular cases. There is no reason why the doctrine of substantial ownership once

*See English statute, which specifically taxes to the grantor income of an irrevocable trust for a term of six years. (12-13 Geo. V, c. 17, Sec. 20 (1922)).

established should not be applied in other fields. The litigation of which the Department now complains will hardly have commenced.⁹

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

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Of Counsel.

January, 1940.

⁹We have not argued the constitutional issues because they do not appear to be raised by the present statutes. The only apparent statutory basis for imposing such tax liability is Section 166. The application for the Writ stressed this basis (Petitioner, 4-8). If Section 166 is construed to apply to the present facts on the broad ground that the settlor is taxable upon income from any trust in which he retains a reversionary interest, the section appears to be clearly unconstitutional in taxing to A the income of B: *Hooper vs. Tax Commission*, 284 U. S. 206; *Helner vs. Donnan*, 285 U. S. 312. If the statute could be construed to include only term trusts of five years, the statute would make an encroachment upon the rule that A's income cannot be taxed to B beyond that permitted by any decision of this court: Cf. *Burnet vs. Wells*, 289 U. S. 670; *Du Pont vs. Commissioner*, 289 U. S. 685. In both of these cases, the beneficiary was not given the unrestricted use of the income as in the present case (R. 23, 24). At the least, if there be any doubt as to constitutionality, the statute should be construed to avoid any constitutional question. *Federal Trade Commission vs. American Tobacco Co.*, 264 U. S. 298; *Knowlton vs. Moore*, 178 U. S.

APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

(U. S. C., Title 26, Sec. 22.)

Sec. 166. Revocable Trusts.

Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—

(1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or

(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom,

then the income of such part of the trust shall be included in computing the net income of the grantor.

(U. S. C., Title 26, Sec. 166.)

Sec. 22. Gross Income.

(a) General Definition.—“Gross income” includes gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

ART. 166-1. Trusts in the corpus of which the grantor retains an interest.—(a) Scope.—Section 166 prescribes that the income, or any part of the income, of certain trusts shall be taxed, not to the trustee nor to

the beneficiaries, but to the grantor because of the fact that the grantor has retained a certain interest in the property of the trust. This article deals with the taxation of such income. The term "corpus," as used in this article, means any part or the whole of the property, real or personal, constituting the subject matter of the trust.

(b) *Test of taxability to the grantor.*—The sufficiency of the grantor's retained interest in the corpus resulting in the taxation of its income to the grantor is determined by a single test, namely, whether the grantor has failed to divest himself, permanently and definitively, of every right which might by any possibility enable him once more to possess and enjoy in title the trust corpus. For the purposes of this article the sufficiency of the grantor's retained interest in the corpus is not affected by the fact that the grantor has provided that the right to cause the title to the corpus to revert in himself is, or may at some future time be, vested in any person (either alone or in conjunction with the grantor) not having a substantial interest in the corpus or income therefrom adverse to the grantor.

If the grantor has retained any such interest in the corpus he is taxable on the income therefrom regardless of—

(1) how great or how small, how remote or how contingent the interest may be;

(2) whatever the nature of interest retained may be; whether the interest retained is vested, contingent, in reversion or otherwise; whether conditioned on the precedent giving of notice, or on the elapsing of a period of years, or on the happening of a specified event; whether taken by appointment, or by designation in the trust instrument, or merely by virtue of the grantor not conveying his whole estate in the corpus, or otherwise;

(3) the time or times at which such interest

will revest the title in the grantor in possession and enjoyment, whether within or without the taxable year, whether or not the time be fixed, determinable or certain to come;

(4) whether, if the revesting in the grantor of title to the corpus is in any way dependent upon the act of anyone, that person be the grantor, or any person not having a substantial interest in the corpus or income therefrom adverse to the grantor, or both. A bare legal interest, such as that of a trustee, is never substantial and never adverse;

(5) when the trust was created.

For example, a grantor has not permanently or definitively divested himself of title to the corpus if he has placed it in trust for his son, John,

(A) for the term of three years, at the end of which time the trust might be extended for a like period at the option of the grantor and successively thereafter; but in the absence of such an extension the title is once more to revest in the grantor in possession and enjoyment; or

(B) for the term of a year and a day, then to be distributed to whomsoever the wife of the grantor shall by deed appoint (the wife not being a beneficiary, but being empowered to appoint to anyone other than herself); or

(C) for the term of the grantor's life, then to be distributed to John, the grantor reserving, however, the right to alter, amend, or revoke any provision of the trust instrument, upon notice of a year and a day.

In these typical cases the grantor has provided that the title shall or may once more revest in himself by the retention of an interest (executory or otherwise) capable of vesting title in the grantor in possession and enjoyment, in (A) upon the expiration of the trust pe-

ried if the grantor does not exercise his option to extend the trust, in (B) upon the designation of the grantor as distributee, by a person not substantially and adversely interested, and in (C) upon the revocation of the trust instrument or an alteration or amendment thereof, resulting in the designation of the grantor as distributee.

Thus the inclusion within the scope of section 166 of any trust is based on the fact that the grantor has retained an interest in the corpus which once more will, or may possibly, vest the title in him in possession and enjoyment. Section 166 makes no distinction between a "revocable trust" (so called because of a provision in the trust instrument permitting some person at some time or in some manner to terminate the trust) and an "irrevocable trust" as such. Some "revocable trusts" are within the scope of section 166, not however by reason of the element of revocability, but because the grantor has reserved the requisite interest in the trust corpus, whether the vesting in title of such interest depends on revocation or otherwise. If no such interest has been retained, a "revocable trust" is not within the scope of section 166, even though the particular trust estate is subject to revocation by the grantor.

If the grantor strips himself permanently and definitively of every such interest in the corpus retained by him, the income of the trust realized after the effective date of such divesting is not taxable to the grantor but is taxable as provided in sections 161 and 162.

(c) *Income and deductions.*—If, as to any of the corpus, the test of taxability to the grantor is satisfied, the gross income of such corpus shall be included in the gross income of the grantor, and he shall be allowed those deductions with respect to such corpus as he would have been entitled to had the trust not been created.

SUPREME COURT OF THE UNITED STATES.

No. 383.—OCTOBER TERM, 1939.

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| Guy T. Helvering, Commissioner of Internal Revenue, Petitioner,

vs.
George B. Clifford, Jr. | } | On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit. |
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[February 26, 1940.]

Mr. Justice DOUGLAS delivered the opinion of the Court.

In 1934 respondent declared himself trustee of certain securities which he owned. All net income from the trust was to be held for the "exclusive benefit" of respondent's wife. The trust was for a term of five years, except that it would terminate earlier on the death of either respondent or his wife. On termination of the trust the entire corpus was to go to respondent, while all "accrued or undistributed net income" and "any proceeds from the investment of such net income" was to be treated as property owned absolutely by the wife. During the continuance of the trust respondent was to pay over to his wife the whole or such part of the net income as he in his "absolute discretion" might determine. And during that period he had full power (a) to exercise all voting powers incident to the trustee's shares of stock; (b) to "sell, exchange, mortgage, or pledge" any of the securities under the declaration of trust "whether as part of the corpus or principal thereof or as investments or proceeds and any income therefrom, upon such terms and for such consideration"; as respondent in his "absolute discretion may deem fitting"; (c) to invest "any cash or money in the trust estate or any income therefrom" by loans, secured or unsecured, by deposits in banks, or by purchase of securities or other personal property "without restriction" because of their "speculative character" or "rate of return" or any "laws pertaining to the investment of trust funds"; (d) to collect all income; (e) to compromise, etc., any claims held by him as trustee; (f) to hold any property in the trust estate in the names of "other persons or in my own

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name as an individual" except as otherwise provided. Extraordinary cash dividends, stock dividends, proceeds from the sale of unexercised subscription rights, or any enhancement, realized or not, in the value of the securities were to be treated as principal, not income. An exculpatory clause purported to protect him from all losses except those occasioned by his "own wilful and deliberate" breach of duties as trustee. And finally it was provided that neither the principal nor any future or accrued income should be liable for the debts of the wife; and that the wife could not transfer, encumber, or anticipate any interest in the trust or any income therefrom prior to actual payment thereof to her.

It was stipulated that while the "tax effects" of this trust were considered by respondent they were not the "sole consideration" involved in his decision to set it up, as by this and other gifts he intended to give "security and economic independence" to his wife and children. It was also stipulated that respondent's wife had substantial income of her own from other sources; that there was no restriction on her use of the trust income, all of which income was placed in her personal checking account, intermingled with her other funds, and expended by her on herself, her children and relatives; that the trust was not designed to relieve respondent from liability for family or household expenses and that after execution of the trust he paid large sums from his personal funds for such purposes.

Respondent paid a federal gift tax on this transfer. During the year 1934 all income from the trust was distributed to the wife who included it in her individual return for that year. The Commissioner, however, determined a deficiency in respondent's return for that year on the theory that income from the trust was taxable to him. The Board of Tax Appeals sustained that redetermination (38 B. T. A. 1532). The Circuit Court of Appeals reversed (105 F. (2d) 586). We granted certiorari because of the importance to the revenue of the use of such short term trusts in the reduction of surtaxes.

Sec. 22(a) of the Revenue Act of 1934 (48 Stat. 680) includes among "gross income" all "gains, profits, and income derived from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any

source whatever." The broad sweep of this language indicates the purpose of Congress to use the full measure of its taxing power within those definable categories. Cf. *Helvering v. Midland Mutual Life Insurance Co.*, 300 U. S. 216. Hence our construction of the statute should be consonant with that purpose. Technical considerations, niceties of the law of trusts or conveyances, or the legal paraphernalia which inventive genius may construct as a refuge from surtaxes should not obscure the basic issue. That issue is whether the grantor after the trust has been established may still be treated, under this statutory scheme, as the owner of the corpus. See *Blair v. Commissioner*, 300 U. S. 5, 12. In absence of more precise standards or guides supplied by statute or appropriate regulations,¹ the answer to that question must depend on an analysis of the terms of the trust and all the circumstances attendant on its creation and operation. And where the grantor is the trustee and the beneficiaries are members of his family group, special scrutiny of the arrangement is necessary lest what is in reality but one economic unit be multiplied into two or more² by devices which, though valid under state law, are not conclusive so far as § 22(a) is concerned.

In this case we cannot conclude as a matter of law that respondent ceased to be the owner of the corpus after the trust was created. Rather, the short duration of the trust, the fact that the wife was the beneficiary, and the retention of control over the corpus by respondent all lead irresistibly to the conclusion that respondent continued to be the owner for purposes of § 22(a).

So far as his dominion and control were concerned it seems clear that the trust did not effect any substantial change. In substance his control over the corpus was in all essential respects the same after the trust was created, as before. The wide powers which he retained included for all practical purposes most of the control which he as an individual would have. There were, we may assume, exceptions, such as his disability to make a gift of the corpus to others during the term of the trust and to make loans to himself. But this dilution in his control would seem to be insignificant and immaterial, since control over investment remained. If it be said

¹ We have not considered here Art. 166-1 of Treasury Regulations 86 promulgated under § 166 of the 1934 Act and in 1936 amended (T. D. 4629) so as to rest on § 22(a) also, since the tax in question arose prior to that amendment.

² See Paul, *The Background of the Revenue Act of 1937*, 5 Univ. Chic. L. Rev. 41.

that such control is the type of dominion exercised by any trustee, the answer is simple. We have at best a temporary reallocation of income within an intimate family group. Since the income remains in the family and since the husband retains control over the investment, he has rather complete assurance that the trust will not effect any substantial change in his economic position. It is hard to imagine that respondent felt himself the poorer after this trust had been executed or, if he did, that it had any rational foundation in fact. For as a result of the terms of the trust and the intimacy of the familial relationship respondent retained the substance of full enjoyment of all the rights which previously he had in the property. That might not be true if only strictly legal rights were considered. But when the benefits flowing to him indirectly through the wife are added to the legal rights he retained, the aggregate may be said to be a fair equivalent of what he previously had. To exclude from the aggregate those indirect benefits would be to deprive § 22(a) of considerable vitality and to treat as immaterial what may be highly relevant considerations in the creation of such family trusts. For where the head of the household has income in excess of normal needs, it may well make but little difference to him (except income-tax-wise) where portions of that income are routed—so long as it stays in the family group. In those circumstances the all-important factor might be retention by him of control over the principal. With that control in his hands he would keep direct command over all that he needed to remain substantially the same financial situation as before. Our point here is that no one fact is normally decisive but that all considerations and circumstances of the kind we have mentioned are relevant to the question of ownership and are appropriate foundations for findings on that issue. Thus, where, as in this case, the benefits directly or indirectly retained blend so imperceptibly with the normal concepts of full ownership, we cannot say that the triers of fact committed reversible error when they found that the husband was the owner of the corpus for the purposes of § 22(a). To hold otherwise would be to treat the wife as a complete stranger; to let mere formalism obscure the normal consequences of family solidarity; and to force concepts of ownership to be fashioned out of legal niceties which may have little or no significance in such household arrangements.

The bundle of rights which he retained was so substantial that respondent cannot be heard to complain that he is the "victim of des-

potie power when for the purpose of taxation he is treated as owner altogether." See *Dupont v. Commissioner*, 289 U. S. 685, 689.

We should find that liability under § 22(a) is not foreclosed by reason of the fact that Congress made specific provision in § 166 for revocable trusts, but failed to adopt the Treasury recommendation in 1934, *Helvering v. Wood*, — U. S. —, that similar specific treatment should be accorded income from short term trusts. Such choice, while relevant to the scope of § 166, *Helvering v. Wood*, *supra*, cannot be said to have subtracted from § 22(a) what was already there. Rather, on this evidence it must be assumed that the choice was between a generalized treatment under § 22(a) or specific treatment under a separate provision³ (such as was accorded revocable trusts under § 166); not between taxing or not taxing grantors of short term trusts. In view of the broad and sweeping language of § 22(a), a specific provision covering short term trusts might well do no more than to carve out of § 22(a) a defined group of cases to which a rule of thumb would be applied. The failure of Congress to adopt any such rule of thumb for that type of trust must be taken to do no more than to leave to the triers of fact the initial determination of whether or not on the facts of each case the grantor remains the owner for purposes of § 22(a).

In view of this result we need not examine the contention that the trust device falls within the rule of *Lucas v. Earl*, 281 U. S. 111 and *Burnet v. Leininger*, 285 U. S. 136, relating to the assignment of future income; or that respondent is liable under § 166, taxing grantors on the income of revocable trusts.

The judgment of the Circuit Court of Appeals is reversed and that of the Board of Tax Appeals is affirmed.

It is so ordered.

³ As to the disadvantage of a specific statutory formula over more generalized treatment see Vol. I, Report, Income Tax Codification Committee (1936), a committee appointed by the Chancellor of the Exchequer in 1927. In discussing revocable settlements the Committee stated, p. 298:

"This and the three following clauses reproduce section 20 of the Finance Act, 1922, an enactment which has been the subject of much litigation, is unsatisfactory in many respects, and is plainly inadequate to fulfil the apparent intention to prevent avoidance of liability to tax by revocable dispositions of income or other devices. We think the matter one which is worthy of the attention of Parliament."

SUPREME COURT OF THE UNITED STATES.

No. 383.—OCTOBER TERM, 1939.

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| Guy T. Helvering, Commissioner of
Internal Revenue, Petitioner,
vs.
George B. Clifford, Jr. | } | On Writ of Certiorari to the
United States Circuit Court
of Appeals for the Eighth
Circuit. |
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[February 26, 1940.]

Mr. Justice ROBERTS.

I think the judgment should be affirmed.

The decision of the court disregards the fundamental principle that legislation is not the function of the judiciary but of Congress.

In every revenue act from that of 1916 to the one now in force a distinction has been made between income of individuals and income from property held in trust.¹ It has been the practice to define income of individuals, and, in separate sections, under the heading "Estates and Trusts", to provide that the tax imposed upon individuals shall apply to the income of estates or of any kind of property held in trust. A trust is a separate taxable entity. The trust here in question is a true trust.

While the earlier acts were in force creators of trusts reserved power to repossess the trust corpus. It became common also to establish trusts under which, at the grantor's discretion, all or part of the income might be paid to him, and to set up trusts to pay life insurance premiums upon policies on the grantor's life. The situation was analogous to that now presented. The Treasury, instead of asking this court, under the guise of construction, to amend the act, went to Congress for new legislation. Congress provided, by § 219(g) (h) of the Revenue Act of 1924, that if the grantor set

¹ Revenue Act of 1916, 39 Stat. 756, § 2(a)(b); Revenue Act of 1918, 40 Stat. 1057, § 213(a), § 219; Revenue Act of 1921, 42 Stat. 227, § 213(a), § 219; Revenue Act of 1924, 43 Stat. 253, § 213(a), § 219; Revenue Act of 1926, 44 Stat. 9, § 213(a), § 219; Revenue Act of 1928, 45 Stat. 791, § 22(a), §§ 161 to 169, incl.; Revenue Act of 1932, 47 Stat. 169, § 22(a), §§ 161 to 169 incl.; Revenue Act of 1934, 48 Stat. 680, § 22(a), §§ 161 to 167, incl.; Revenue Act of 1936, 49 Stat. 1648, § 22(a), §§ 161 to 167, incl.

up such a life insurance trust, or one under which he could direct the payment of the trust income to himself, or had the power to revest the principal in himself *during any taxable year*, the income of the trust, for the taxable year, was to be treated as his.²

After the adoption of these amendments taxpayers resorted to the creation of revocable trusts with a provision that more than a year's notice of revocation should be necessary to termination. Such a trust was held not to be within the terms of § 219(g) of the Revenue Act of 1924, because not revocable within the taxable year.³

Again, without seeking amendment in the guise of construction from this court, the Treasury applied to Congress, which met the situation by adopting § 166 of the Revenue Act of 1934, which provided that, in the case of a trust under which the grantor reserved the power at *any time* to revest the corpus in himself, the income of the trust should be considered that of the grantor.

The Treasury had asked that there should also be included in that act a provision taxing to the grantor income from short term trusts. After the House Ways and Means Committee had rendered a report on the proposed bill, the Treasury, upon examination of the report, submitted a statement to the Committee containing recommendations for additional provisions; amongst others, the following: "(6) The income from short-term trusts and trusts which are revocable by the creator at the expiration of a short period after notice by him should be made taxable to the creator of the trust." Congress adopted an amendment to cover the one situation but did not accept the Treasury's recommendation as to the other.⁴ The statute, as before, clearly provided that the income from a short term irrevocable trust was taxable to the trust, or the beneficiary, and not to the grantor.

The regulations under § 166 of the Act of 1932 contained no suggestion that term trusts were taxable to the creator though, if the petitioner is right, they would be equally so under that act as under later ones. Thus though the Treasury realized that irre-

² See *Corliss v. Bowers*, 281 U. S. 376; *Barnet v. Wells*, 289 U. S. 670.

³ *Lewis v. White*, 56 F. (2d) 390; 61 F. (2d) 1046; *Langley v. Commissioner*, 61 F. (2d) 796; *Commissioner v. Grosvenor*, 85 F. (2d) 2; *Eaber v. United States*, 1 F. Supp. 859.

⁴ Hearings on H. R. 7835, 73d Cong., 2d Sess., p. 151; H. R. 1385, 73d Cong., 2d Sess., p. 24.

vocable short term trusts did not fall within the scope of § 166, instead of going to Congress for amendment of the law it comes here with a plea for interpretation which is in effect such amendment.

Its claim, in support of this effort, that a reversionary interest in the grantor is a "power to revest" the corpus within the meaning of § 166 so as to render the income taxable to the grantor is plainly untenable.⁵ That theory was first advanced in a regulation issued under the 1934 act,⁶ but was abandoned March 7, 1936; when the regulation was revised to read substantially in its present form.⁷ The Board of Tax Appeals held a possibility of reverter is not the "power to revest" described in § 166.⁸ The petitioner acquiesced in the decision.⁹ The Treasury thereafter ruled that a grantor was not taxable on the income of a trust where he had retained a reversionary interest.¹⁰

I think it clear that the administrative interpretation has not been consistent and that reenactment of § 166 is, therefore, not a ratification by Congress of the present construction.

The revised regulations indicating that in some circumstances the separate taxability of the trust may be ignored are said to rest on § 166, and also on § 22(a) which defines income. The regulation is not only without support in the statute but contrary to the entire statutory scheme and, as it now stands, is vague and meaningless, as respects the taxability to the grantor of income from an irrevocable term trust.

To construe either § 166 or § 22(a) of the statute as justifying taxation of the income to respondent in this case is, in my judgment, to write into the statute what is not there and what Congress has omitted to place there.

If judges were members of the legislature they might well vote to amend the act so as to tax such income in order to frustrate avoidance of tax but, as judges, they exercise a very different function. They ought to read the act to cover nothing more than Con-

⁵ *United States v. First National Bank*, 74 F. (2d) 360; *Corning v. Commissioner*, 104 F. (2d) 329.

⁶ Regulations 86, Art. 166-1.

⁷ T. D. 4629, C. B. XV-1, 140.

⁸ *Downs v. Commissioner*, 36 B. T. A. 1129.

⁹ C. B. 1938-1, p. 9.

¹⁰ I. T. 3238, C. B. XVII-2, p. 204.

gress has specified. Courts ought not to stop loopholes in an act at the behest of the Government, nor relieve from what they deem a harsh provision plainly stated, at the behest of the taxpayer. Relief in either case should be sought in another quarter.

No such dictum as that Congress has in the income tax law attempted to exercise its power to the fullest extent will justify the extension of a plain provision to an object of taxation not embraced within it. If the contrary were true, the courts might supply whatever they considered a deficiency in the sweep of a taxing act. I cannot construe the court's opinion as attempting less.

The fact that the petitioner is in truth asking us to legislate in this case is evident from the form of the existing regulation and from the argument presented. The important portion of the regulation reads as follows: "In determining whether the grantor is in substance the owner of the corpus, the Act has its own standard, which is a substantial one, dependent neither on the niceties of the particular conveyancing device used nor on the technical description which the law of property gives to the estate or interest transferred to the trustees or beneficiaries of the trust. In that determination, among the material factors are: The fact that the corpus is to be returned to the grantor after a specific term; the fact that the corpus is or may be administered in the interest of the grantor; the fact that the anticipated income is being appropriated in advance for the customary expenditures of the grantor or those which he would ordinarily and naturally make; and any other circumstance bearing on the impermanence and indefiniteness with which the grantor has parted with the substantial incidents of ownership in the corpus."

In his brief the petitioner says:

"On the other hand, the income of a long term irrevocable trust which committed the possession and control of the corpus to an independent trustee *would not likely* be taxed to the settlor merely because of a reversionary interest. The question here, as in many other tax problems, is *simply one of degree*. The grantor's liability to tax must depend upon whether he retains so many of the attributes of ownership as to require that he be treated as the owner for tax purposes, or whether he has given up the substance of his dominion and control over the trust property.

"Under these circumstances, the question of *precisely where the line should be drawn* between those irrevocable trusts which deprive the grantor of command over the trust property and those

which leave in him the practical equivalent of ownership is, in our view, *a matter peculiarly for the judgment of the agency charged with the administration of the tax law.*" (Italics supplied.)

It is not our function to draw any such line as the argument suggests. That is the prerogative of Congress. As far back as 1922, Parliament amended the British Income Tax Act, so that there would be no dispute as to what short term trust income should be taxable to the grantor, by making taxable to him any income which, by virtue of any disposition, is payable to, or applicable for the benefit of, any other person for a period which cannot exceed six years.¹¹

If some short term trusts are to be treated as non-existent for income tax purposes, it is for Congress to specify them.

Mr. Justice McREYNOLDS joins in this opinion.

¹¹ 12 and 13 Geo. 5, ch. 17, § 20, L. R. Statutes, Vol. 60, p. 373. Though the provision has been thought unsatisfactory, the suggestion made for improvement is that the matter be brought before Parliament for action.

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